



3 1761 08248740 6

HANDBOUND
AT THE



UNIVERSITY OF



Digitized by the Internet Archive
in 2010 with funding from
University of Toronto

6754

1

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE


Under the Direction of the
Departments of History, Political Economy, and
Political Science

VOLUME XXVIII



118586
2119/11

BALTIMORE
THE JOHNS HOPKINS PRESS
1910



COPYRIGHT 1910, 1911 BY
THE JOHNS HOPKINS PRESS

PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

TABLE OF CONTENTS

	PAGE.
I. HISTORY OF RECONSTRUCTION IN LOUISIANA (THROUGH 1868). By J. R. FICKLEN.....	I
II. THE TRADE UNION LABEL. By E. R. SPEDDEN.....	237
III. THE DOCTRINE OF NON-SUABILITY OF THE STATE IN THE UNITED STATES. By K. SINGEWALD.....	337
IV. DAVID RICARDO. By J. H. HOLLANDER.....	453

HISTORY OF RECONSTRUCTION IN LOUISIANA

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and
Political Science

HISTORY OF
RECONSTRUCTION IN LOUISIANA

(Through 1868)

BY
JOHN ROSE FICKLEN
Author of "Constitutional History of Louisiana."

BALTIMORE
THE JOHNS HOPKINS PRESS

1910

F
375
F.54

COPYRIGHT 1910 BY
THE JOHNS HOPKINS PRESS

PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

CONTENTS.

	PAGE
EDITORIAL NOTE	vii
PREFACE	7
CHAPTER I. Ante-Bellum History in Louisiana	9
CHAPTER II. Butler's Administration	33
CHAPTER III. Banks's Administration—1862—Reconstruction under the Presidential Plan	45
CHAPTER IV. The Convention of 1864	67
CHAPTER V. Government during the War	88
CHAPTER VI. Reconstruction in Louisiana under President Johnson	98
CHAPTER VII. The So-called Riot of July 30, 1866	146
CHAPTER VIII. The Reconstruction Acts, 1866-1867	180
CHAPTER IX. Restoration of Louisiana to the Union	193
CHAPTER X. Party Organization	205
CHAPTER XI. Massacre of 1868 and the Presidential Elections	225

EDITORIAL NOTE.

The author of the present volume, John Rose Ficklen, son of Joseph Burwell Ficklen and Ann Eliza Fitzhugh, came of an old and sturdy family of Virginia, and the essentially fine qualities of the man were colored by that indefinable tint of gentility that is the precious heritage of such an ancestry. Born in Falmouth, Virginia, in 1858, he received at the University of Virginia that solid and yet broad cultural training that distinguished the old college, and after graduation he devoted himself at once to the pursuit of scholarship. After a short period of teaching at the Louisiana State University, Baton Rouge, Mr. Ficklen spent two years abroad, studying at the universities of Paris and Berlin. He was connected with the University of Louisiana, in New Orleans, before the foundation of Tulane University, and upon the merging of the two became professor of rhetoric and history. Mr. Ficklen grew with the newly created university, and soon began to devote himself to history, especially to the history of Louisiana. In 1893 he became professor of history and political science, and still held this position when, in the summer of 1907, his life was cut short by one of those accidents that seem the work of a blind fate.

In presenting to the public this last and most cherished fruit of his studies, I wish to turn aside for a moment to record my own impressions of Professor Ficklen as a man and as a teacher. I shall not soon forget the thoroughness of his method as an instructor, his innate refinement and unflinching courtesy in dealing with the student. In the classroom, and when in later years I had the honor of becoming his colleague, Professor Ficklen was always the same helpful friend, unobtrusive yet ready in his counsel, generous, with no thought of making one who had been his pupil feel any condescension in his manner. It was this rare modesty

and perfect frankness of attitude that was—I am confident other former pupils will bear me out—the most pleasantly remembered characteristic of the man.

For more than a decade before his death Professor Ficklen had been carefully collecting and digesting the materials for a history of the reconstruction period in Louisiana. The work was one requiring immense patience and tact, for the mists of party strife have not yet cleared away; many of the actors in the great contest for control of the State are still living; their accounts, as well as most of the documentary material for the work, even after they had once been secured, needed the most careful adjustment before it was possible to present a record at once clear and fair. Moreover, the work was frequently interrupted by other historical studies, and always made subordinate to the first duty of the academic instructor. But at the time of his death Professor Ficklen was proceeding rapidly in the synthesis of the scattered data he had collected, and the work now presented was completed by him in manuscript in something like the form he wished it to assume finally.

Since the manuscript, however, had not received his final revision, the editor has felt at liberty to revise, striving always to preserve the substance and the wording. There has been no alteration affecting matters of fact, no addition to or change in the deductions drawn from facts. Obvious errors have been corrected, a few passages of needless matter repeating facts stated elsewhere have been omitted, and the work has been divided into chapters. This has been done under the direction of Professor Charles M. Andrews, of the Johns Hopkins University, and under his direction the references have been verified and put into proper shape by Mr. Clarence P. Gould. The editor takes this occasion to acknowledge with gratitude the able assistance of Mr. William Beer, of the Howard Memorial Library, in verifying certain references.

In no state of the former Confederacy was the work of Reconstruction attended with greater difficulties than in Louisiana. The history of the period was marked by epi-

sodes that at the time attracted the attention of the nation, and that still echo in the press. It is a matter of deep regret that a student so well informed, so calm and judicious as Professor Ficklen did not live to complete in detail the account of the remarkable revolution whose beginnings he has presented with such clearness. Incomplete as it is, however, the present volume will prove a valuable contribution to the history of this most important period of southern history.

PIERCE BUTLER.

NEWCOMB COLLEGE,
TULANE UNIVERSITY,
February 19, 1910.

PREFACE.

It has been said by a northern historian that the story of the war between the States should be written by writers of the North because the victors can always afford to show, and will show, a more generous spirit in dealing with the facts than can be expected of the conquered, and also for the reason that the northern view is in the main correct. From this proposition the corollary has been drawn that the story of Reconstruction in the South should be told by writers of the South, for to the South was given the final victory in this conflict;¹ and it is beginning to be acknowledged by writers of the North that Reconstruction of the congressional type was a gigantic blunder—if not a political crime.

Whatever may be thought of the theories just mentioned, no one will deny that in the official records of the time we have the facts given in exasperating detail of the political progress of Reconstruction, innumerable investigations filling volumes, orders and statutes and decisions of court galore. For no other period is there so much sworn testimony, but of the life in the South at this period, of the thoughts and feelings of the mass of people who were disaffected to the Federal government, no adequate portrayal has been given for the South as a whole. Novelist and essayist have attempted it for particular States, but even here their attempts, however successful, have not given more than a partial view of life in the South during those days of storm and stress.

Such a book is not easy of execution. Those who lived through the time either do not care to write of their humiliation, or are so carried away by the intensity of their feelings that they present a distorted view of the period as a whole. The task must fall to the historian of the younger generation, but it demands a rarely sympathetic touch to draw

¹David Y. Thomas, "The South and her History," *Review of Reviews*, October, 1902, p. 464.

forth from those who lived through this period the recollection that they would often rather conceal than reveal; it requires much power of generalization not to lose oneself in the infinite detail while drawing a picture that shall be clear and distinct; and it requires a calmness and impartiality of judgment, hitherto little shown by North or South, to enter into the thoughts and feelings of that day and to weigh its conflicting aims and purposes. To gather the needed materials, to get into touch with those who can speak with authority, will naturally be the task of southern writers. Recognition of this fact has been constantly coming from the North itself, and the present writer has received abundant encouragement from his northern friends and colleagues in the arduous task of describing the reconstruction period in Louisiana since he set it before him some five years ago.

It is not for the writer to arrogate to himself especial qualifications for his task; but he might without presumption urge that he has been accustomed for many years to deal with historical problems in which the passions of men were involved, and in this instance he was too young to take any part in the events which he wishes to narrate, and thus may escape some of the snares of partizanship. Actual participants in a struggle are almost never the best narrators of events. Their narratives are valuable for comparison with the narratives of those who were opposed to them, but generally those who participate are too near to see the whole or to catch the proper perspective. Born in another Southern State, the writer came to Louisiana just at the close of the period of Reconstruction, and the best years of his life have been passed among men who were active participants in the work, and he numbers among his acquaintances some of the prominent actors on both sides of the great controversy. Upon these facts he bases his hopes of a fairly unbiased judgment. He does not expect nor wish, however, to produce a colorless narrative. He proposes to comment freely on events and on the characters of the men who figured therein.

JOHN R. FICKLEN.

HISTORY OF RECONSTRUCTION IN LOUISIANA (THROUGH 1868).

CHAPTER I.

ANTE-BELLUM HISTORY IN LOUISIANA.

There is a strong tendency in mankind to view the past through a golden haze—a tendency which is illustrated in history and literature from the times when the Homeric Nestor bewailed the fact that the young men were no longer so brave and strong as in his own youth down to our own day. Thus there are not lacking in Louisiana those who look back to the thirties and early forties with regret, and declare that at that period politics were pure, the office sought the man, and there was no rampant democracy to sue for the support of the proletariat and reduce all classes of voters to a level. These eulogists of the past would have us believe that in the years 1843 to 1846, when the old Whig party lost control of the State, and when not only was a Democratic governor elected but a Democratic constitution adopted abolishing the previous property qualification for the suffrage, Louisiana suffered a distinct deterioration in her political status and departed from the ideals she had held before her in the past. As democracy as a form of government is still on trial, it may not be possible to determine definitively whether the latter condition of Louisiana was better than the former; heredity and association will decide for most people whether they will take one side or the other. The fact remains, however, that the period mentioned records an important change in the dominant attitude of Louisiana toward political affairs. The State had for many years leaned toward the principles of the

Whigs. It is not to be expected that where towns are few and large plantations are numerous the seeds of democracy will find as favorable soil as in New England townships. Moreover, the Whig platform of protection to internal industries and of subsidies to internal improvements suited to perfection a State where each large plantation had invested much capital in the planting and manufacture of sugar and demanded protection, and where the numerous waterways needed the aid of the Federal government for their improvement.

But in the early forties the great mass of immigrants who had poured into the northern part of the State, where small farms contrasted with the plantations of the southern section, cared nothing for the theories of the Whigs, and their democratic sentiments were echoed by the foreign immigrants who took up their residence in New Orleans. Moreover, the Whigs began to lose popularity because of a new issue which had arisen like a storm cloud upon the horizon, and now began to overshadow ominously the question of protection to manufactures and internal improvements. This issue was the extension of slavery, violently opposed by the northern Whigs and strongly favored by the southern Democrats. Furthermore, the admission of Texas into the Union, which was already a national question, placed the Whigs of Louisiana in a quandary. As slave-owners themselves, they could not oppose the extension of slavery by the acquisition of Texas, but they feared the possible rivalry of Texas as a producer of Louisiana staples. In any case, in 1844 the State was carried for Polk and annexation by the political genius of John Slidell, who became the undisputed leader of the Democratic party, and who has never been equalled in Louisiana for skill in political strategy and for success in inspiring the blind devotion of political adherents. It is true that in 1848, in the national mix-up of politics, Louisiana, with five other Southern States, voted for Zachary Taylor, a Whig, but a resident of Louisiana and a slave-owner, in preference to Lewis Cass, the Demo-

cratic candidate, whose doctrine on the slavery question did not go far enough; but in all local affairs the Democrats held their own against the Whigs, and the spoils of office were theirs.

Many disgruntled Whigs went over to a new party which for a while exercised a great fascination over the minds of men in all sections of the country. The Know-Nothings, who derived their name from their invariable answer to all inquiries as to their platform that they "knew nothing in their principles contrary to the Constitution and the laws of the land," composed a gigantic secret society which appealed to many by its paraphernalia of signs, grips, and gradations of the initiated. Its principles seem to have included purification of elections, the exclusion of foreigners from public offices, and an insistence on the doctrine that the office must seek the man. We have the testimony of Charles Gayarré, the historian of Louisiana, who was an adherent of the new order, that not only the Whigs but the whole of Louisiana may truly be said to have rushed with enthusiastic precipitation into the arms of this seductive society. Soon, however, it began to be whispered about that the order was opposed to the Catholic religion and intended to proscribe all Catholics. The rumor was put to the test when, at a great convention in Philadelphia, a delegation of five Protestants and one Catholic presented themselves from Louisiana. The Catholic was refused admission,¹ and resenting this discrimination against a State in which half the population was Catholic, all the delegates withdrew. In vain the leaders of the movement agreed to make a discrimination on this point in favor of Louisiana; the order was doomed. In Louisiana its adherents fell away rapidly, and its secrecy and its religious intolerance, so opposed to the American spirit, precipitated its ruin everywhere.² In New Orleans, however, it did not die without a struggle. Such scenes of violence and intima-

¹ This was Charles Gayarré himself.

² Gayarré, *History of Louisiana*, IV, 678.

tion occurred at an election for sheriff in 1853 that, though the Know-Nothings elected a sheriff named Hafty, he was removed from office by a formal act of legislature. The death-knell of Know-Nothingism had been sounded.

In Louisiana mutterings of the coming struggle between the States preceded actual hostilities by several years. As we read the messages of the governors of the State in the period before secession we catch more than one reflection of the deep unrest which filled the minds of Louisianians and of the defiant attitude which the utterances of the new or "Black" Republican party had aroused. "The irrepressible conflict between opposing and enduring forces," as Seward named it in 1858, had already been recognized as a reality by some of the wiser spirits of the time, and men had begun to take sides on the basis of the finer distinctions which the great controversy was bringing to light. A suspicion of heresy on the subject of the "peculiar institution" was sufficient to declare the ineligibility of any candidate for office; nay, more, orthodoxy began to depend upon the correct attitude toward the doctrine of "Squatter Sovereignty" and the extreme view held as to Federal protection of slavery in the territories. It was even maintained that Slidell, the great leader of the Democracy, whose orthodoxy had been beyond reproach, was not above suspicion in regard to the extreme claims of his party, and that, being by birth a Northerner, he was not in full sympathy with Louisianians, but upheld the doctrines of Stephen A. Douglas.¹ Hence Pierre Soulé, a Frenchman by birth, but long a resident of Louisiana—a Prince Rupert of oratory—headed a factional fight against Slidell.²

When the Democratic convention met in Charleston in

¹ Soulé, who disliked Slidell, may have said this, but Senator Jonas says that there never was any truth in it; Slidell was always pro-southern.

² Soulé himself ended by becoming a Douglas man and a cooperationist, whether from conviction or from a desire to oppose Slidell does not seem clear. McCaleb says Soulé supported Douglas in 1856 and 1860: "Subsequently, to the surprise of his friends, he declared himself an opponent to the secession of Louisiana." *The Louisiana Book*, ed. by McCaleb, p. 137.

April, 1860, a strong opposition developed to the nomination of Douglas. On the question of the extension of slavery in the territories Douglas held the doctrine that the people of any territory in their territorial condition had the right to determine whether slavery should or should not exist there, and he denied the duty, or even the right, of Congress to protect persons or their property (slaves) in a territory against the will of a majority therein. This doctrine, that a territorial legislature was stronger than Congress itself and could determine the policy of a territory before it was ready to frame its constitution for statehood, was given full utterance by Douglas in his great debate with Lincoln in 1858, but it did not please the great majority of Southerners, who held that, according to the Dred Scott decision, Congress must protect slavery in a territory until the territory became a state.

In pushing his "Squatter Sovereignty" so far, Douglas lost, in a great measure, the adherence of the Southern States and forced them to choose a candidate who upheld their peculiar views. This candidate was John C. Breckenridge of Kentucky. The choice of Breckenridge produced a fatal schism; and, to make the situation still more desperate, some elements of the old Know-Nothing party and some new elements combined to nominate John Bell, of Tennessee, who conservatively held that the extreme views of Republicans and Democrats should be dropped and that the platform should be simply "The Constitution of the country, the union of the States, and the enforcement of the laws." Because of these Democratic divisions the Republicans carried their candidate, Abraham Lincoln, to victory on a platform which declared in favor of leaving alone the domestic institutions of the States and of keeping slavery out of the territories. The electoral vote for Lincoln was 180, and for all the other candidates 103; but the popular vote for the Democratic candidates was 2,823,741, while Lincoln received only 1,866,452. In Louisiana Breckenridge received 22,681 votes, Bell, 20,204, and Douglas,

7625. Slidell had organized his party so well that the State was carried for his candidate and Douglas was defeated; but it will be noted that the vote for Bell, representing the conservative view, was almost as large as the vote for Breckenridge.

In the meantime the messages of the governors of Louisiana to the General Assembly had shown evidence of the growing bitterness of feeling toward the North, and especially toward the Abolitionists. This party had indulged in unmeasured abuse of the South, and represented its whole industrial system as based upon sin and iniquity. It was a subject of special complaint on the part of the South that at least twenty Northern States had passed "personal liberty laws" intended to defeat the laws passed by Congress, in accordance with the Constitution, to secure the return of fugitive slaves. "Such acts," says Wilson, "were as plainly attempts to nullify the constitutional action of Congress as if they had spoken the language of the South Carolina ordinance of 1832."¹ Nor was this paying back the South in her own coin, for South Carolina at least maintained that her nullification ordinance was constitutional, while the North did not pretend to make any such claims for the "personal liberty" laws. Governor Chase openly declared that he would sustain by force, if necessary, the decision of the supreme court of Ohio against the decision of the Supreme Court of the United States, even if it resulted in a collision between state and general government.² Not at any time was nullification more rife in South Carolina than among Ohio Abolitionists.

Hence in 1856 we find Governor Hebert of Louisiana declaring in his valedictory message that "the wild spirit of fanaticism which has, for so many years, disturbed the peace of the country, has steadily increased in power and influence. It controls the councils of several states, nullifies the laws of Congress enacted for the protection of our property, and

¹ Division and Reunion, p. 208.

² S. S. Cox, *Three Decades of Federal Legislation*, p. 63.

resists the execution of them, even to the shedding of blood. It has grown so powerful that it now aspires to control the Federal Legislature. . . . The slave-holding States are warned in time. They should be prepared for the issue. *If it must come, the sooner the better.* The time for concessions on our part and compromises has past.”¹ Again, Governor R. C. Wickliffe, who succeeded Hebert, in his inaugural address adopts a similar tone, and adds: “I do not wish to speak lightly of the Union. Next to the liberty of the citizen and the sovereignty of the States, I regard it as the ‘primary object of patriotic desire.’ It should be dear to us as a sentiment, and dearer to us for its real value. But it cannot have escaped observation, that the hold which the Union once had upon the affection of the South has been materially weakened, and that its dissolution is now frequently spoken of, if not with absolute levity, yet with positive indifference, and, occasionally, as desirable.”² The election of Buchanan in 1856, however, came as a reassuring measure to the South, and the messages of the governors assumed a more hopeful tone; but in 1860 the rapid increase in numbers of the new Republican party aroused intense alarm, and the recent incursion of John Brown into Virginia summoned up the spectre of negro insurrection never entirely laid in the South.

No sooner was the election of Lincoln an assured fact than the legislature of Louisiana was called in extra session, and the governor’s message expressed his belief that the election, “by a purely sectional vote, and in contempt of the earnest protest of the other section, . . . was to be considered as evidence of a deliberate design to pervert the powers of the Government to the immediate injury and ultimate destruction of the peculiar institution of the South.” In accordance with a very general view in the South that action looking toward secession should be taken before the inauguration of Lincoln, the governor further advised the

¹ Gayarré, Louisiana, IV, 680.

² Ibid., 681.

legislature to issue a call for a convention "to meet *at once*, and determine *at once*" the attitude of Louisiana. His own view of the matter the governor expressed in no uncertain tone: "I do not think it comports with the honor and self-respect of Louisiana, as a slave-holding State, to live under the government of a Black Republican President. I will not dispute the fact that Mr. Lincoln is elected according to the forms of the Constitution, but the greatest outrages, both upon public and private rights, have been perpetrated under the forms of law. This question rises high above ordinary political considerations. It involves our present honor and our future existence as a free and independent people. It may be said that, when this Union was formed, it was intended to be perpetual. So it was, as far as such a term can be applied to anything human; but it was also intended to be administered in the same spirit in which it was made, with a scrupulous regard to the equality of the sovereignties composing it. We certainly are not placed in the position of subjects of a European despotism, *whose only door of escape from tyranny is the right of revolution*. I maintain the right of each State to secede from the Union, and, therefore, whatever course Louisiana may pursue now, if any attempt should be made by the Federal Government to coerce a sovereign State, and compel her to submission to an authority which she has ceased to recognize, I should unhesitatingly recommend that Louisiana assist her sister States with the same alacrity and courage with which the colonies assisted each other in their struggle against the despotism of the Old World."¹

On January 7, when the election for members of the secession convention was held, the votes for the Southern Rights candidates is said to have been 20,448, and for their opponents 17,296.² The policies of the opponents were

¹ Gayarré, Louisiana, IV, 689-90.

² J. F. Condon in Martin, History of Louisiana, p. 457; Lalor, Cyclopaedia of Political Science, subject "Secession." The present secretary of state for Louisiana (1903) informs the author that the returns of this election are not in his office, and that if they exist they are in Washington. No newspaper of the time published complete returns.

various, but the chief one was the cooperation¹ of the Southern States within the Union. The convention met at Baton Rouge, January 23, 1861, and adjourned two months later, Saturday, March 23. The message of the governor to the General Assembly, which met on the same day, was also read to the convention. The governor held that the recent election in relation to the convention "had confirmed the faith of their Representatives in the Legislative and Executive station that the undivided sentiment of the State was for immediate and effective resistance; and that there was not found within her limits any difference of sentiment, except as to minor points of expediency, in regard to the manner and time of making such resistance, so as to give it the most imposing form for dignity and success."²

After the convention was organized and Alexander Mouton elected president, J. A. Rozier, the spokesman of the cooperationists, proposed, as a substitute for immediate secession, the following: "That a Convention be called in Nashville, February 25, 1861, of all the slave-holding States, or as many as will unite therein to procure amendments to the Federal Constitution protecting the slave-holding States; and if these cannot be procured, it shall forthwith organize a separate Confederacy of slave-holding States." This motion, however, was lost by a vote of 106 to 24. James O. Fuqua, representing a somewhat different view, offered a motion providing that the coercion of any seceding State be regarded by Louisiana as an act of war on all slaveholding States, absolving any State from allegiance to the Federal government, and furnishing Louisiana with an opportunity to make common cause with the State attacked; Louisiana, however, should send delegates to Montgomery, February 24, 1861, and assist in the formation of a Federal union of slaveholding States. This hybrid motion was lost, 73 to 47.³ The Slidell party, however, held that any plan for

¹ A cooperationist, according to the *Century Dictionary*, was "one who opposed secession unless carried out with the coopération of other southern States."

² Gayarré, *Louisiana*, IV, 690.

³ *Journal of the Convention of 1861*, pp. 11, 16.

cooperation within the Union was impossible of realization, as the army and the navy of the Federal government would have time to interfere before it could be executed.

Five States had already seceded, and on January 25, J. L. Manning, duly accredited commissioner of South Carolina, and John A. Winston, commissioner from Alabama, were conducted to the floor of the convention, and, showing their credentials like the ministers of foreign powers, addressed the convention on the wisdom of immediate secession. This appeal from sister States furthered the cause already strong in the convention. On the following day, January 26, the convention passed the Ordinance of Secession by a vote of 113 to 17. Eight of those who voted in the negative afterwards signed the ordinance, making the whole number of signers one hundred and twenty-one, only nine refusing. These nine were Roselius, Stocker, Rozier, Lewis of Orleans, Pierson, Taliaferro, Garrett, Hough, and Meredith.

The ordinance was as follows:—

“AN ORDINANCE

“To dissolve the union between the State of Louisiana and other States united with her, under the compact entitled ‘The Constitution of the United States of America.’

“We, the people of the State of Louisiana, in Convention assembled, do declare and ordain, and it is hereby declared and ordained, That the Ordinance passed by us in Convention on the 22d day of November, in the year eighteen hundred and eleven whereby the Constitution of the United States of America, and the amendments of the said Constitution, were adopted; and all laws and ordinances by which the State of Louisiana became a member of the Federal Union, be and the same are hereby repealed and abrogated; and that the union now subsisting between Louisiana and the other States, under the name of ‘The United States of America’, is hereby dissolved.

“We do further declare and ordain, That the State of Louisiana hereby resumes all rights and powers heretofore delegated to the Government of the United States of America; That her citizens are absolved from all allegiance to said government; and that she is in full possession and exercise of all those rights of sovereignty which appertain to a free and independent State.

“We do further declare and ordain, That all rights acquired and vested under the Constitution of the United States or any act of Congress, or treaty, or under any law of the State, and not incompatible with this Ordinance, shall remain in force, and have the same effect as if this Ordinance had not been passed.”¹

¹ Report of the Secretary of State of Louisiana, 1902, insert facing p. 112.

On the 18th of February, 1861, the Louisiana legislature passed the following joint resolutions:—

"1. *Be it resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the right of a sovereign State to secede or withdraw from the Government of the Federal Union, and resume her original sovereignty when in her judgment such act becomes necessary, is not prohibited by the Federal Constitution, but is reserved thereby to the several States, or people thereof, to be exercised, each for itself, without molestation.

"2. *Be it further resolved, etc.,* That any attempt to coerce or force a sovereign State to remain within the Federal Union, come from what quarter and under whatever pretense it may, will be viewed by the people of Louisiana, as well on her own account as of her sister Southern States, as a hostile invasion, and resisted to the utmost extent."

The States of South Carolina, December 20, Mississippi, January 9, Florida, January 10, Alabama, January 11, and Georgia, January 18, had already seceded; and now Louisiana, "with sublime imprudence," to use Gayarré's phrase, decided to cast in her lot with theirs. John Perkins, Alexander Decluet, Charles M. Conrad, Duncan F. Kenner, Henry Marshall, and Edward Sparrow were elected as delegates to the Southern Congress, to meet at Montgomery, February 4, 1861.¹

When it was moved that the convention submit the Ordinance of Secession to the popular vote for ratification, the motion was defeated by a vote of 84 to 45. The constitution, modified in accordance with the new conditions, was to go into effect as the constitutions of the first States of the Union, except Massachusetts, went into effect—without popular ratification. There may have been other reasons for this, but the obvious and important one was that it was believed that there was no time to be lost in submitting to popular vote the action of the convention.²

¹ Crescent, February 4, 1861.

² Perkins of Madison argued against the idea of Roselius that the convention was irregular and unconstitutional because called by the legislature, and he proceeded to cite authorities to show the contrary. Nor was it necessary to refer the ordinance back to the people for approval. "Why submit it to the people when it was known it would be unanimously agreed to? Why refer it at a time when our Sister States are calling for action!! action! action!"

There is a widespread impression in the North that a popular vote would have carried Louisiana against secession and for the Union party. Nothing is further from the truth. However, as there is believed to be great virtue in mere majorities, it seems a pity that the Ordinance of Secession was not submitted to popular vote in Louisiana, as it was in Tennessee and Texas. It was carried by overwhelming majorities in both States,¹ and there is every reason to believe that it would have been carried by a substantial majority in Louisiana after the convention had decided almost unanimously that it was a wise measure. Six months before, the vote might have been against immediate secession, but one must beware of confounding August 1860 with January 1861.²

The fact that the ordinances were not submitted to popular vote except in two States has enabled northern writers to say that the South was hurried into secession by ambitious fire-eaters, who were really conspirators, afraid to consult their constituents. It is also claimed by northern writers that as the representatives in legislatures and conventions were apportioned according to representative population (i. e., three fifths of the slave population being counted in), the large slaveholding sections of each State had a disproportionate representation, and if the ordinances of secession had been submitted to the popular vote, the whole mass of white voters, who alone had the franchise, and the majority of whom had no slaves, would have voted down the ordinances, and thereby shown that the representatives in the conventions did not really represent the majority of white people.³ The argument is plausible but by no means conclusive. It is flatly contradicted in the cases of Tennessee and Texas, and there seems to be no

Picayune, January 29, 1861. Some cooperationists now said that, whatever their previous convictions, they felt that the emergency called for straight-out secession.

¹ In Tennessee, 104,019 to 47,238; in Texas, 34,794 to 11,235.

² Senator Jonas says that he, though a Whig and a Bell man, would have signed the Ordinance of Secession.

³ Lalor, *Cyclopaedia*, subject "Secession," p. 698.

reason to suppose that it would have met with a different answer in the other seceding States.

As there was no popular vote in Louisiana, let us consider what was the will of the voters as expressed in the election of the members to the secession convention. We have seen that out of 130 members 121 signed the Ordinance of Secession, though the vote for the cooperationist members was at least 17,256, while the secessionists claimed only 20,448. Nay, it was asserted by the newspapers of the time that the official returns of the election were suppressed. The *Picayune* of February 17, 1861, published a letter signed "C. B." which says, "I understand from a gentleman just from Baton Rouge that the popular vote in the recent election was in favor of the cooperationist ticket by a majority of 320." Again, the *Picayune* of March 19, 1861, says: "The *Picayune* has been accused by a contemporary of joining in the humbug cry of suppressing the popular vote, but last Saturday the Convention was asked by Mr. Bienvenu and Mr. Rozier to bring the election returns before that body, as it was necessary to know what the popular vote was on the cooperation and secession tickets. The Convention refused to suspend the rules and consider the question raised, by a vote of 72 to 23." Several years later it was a common thing for Republicans in Louisiana to maintain that the official returns were suppressed, and that the State "really voted against secession." A surviving member of the convention¹ writes the author on this point: "In regard to the letter published in the *Picayune*, February 17, 1861, alleging that the Co-operationists had a majority, but the correct returns had been suppressed in the Convention, I do not remember to have seen it, though I was a Co-operationist myself; but it is incredible that such strenuous and determined opponents as were Christian Roselius, J. A. Rozier—not to mention others—would have permitted such an outrage to have been perpetrated without raising a tempest long to be remem-

¹ Hon. S. S. Conner.

bered." Still the report that the cooperationists had been elected by a majority of the votes was rife at the time and is clearly stated in the diary of Mr. John Purcell, then a resident of New Orleans, under date of February 4, 1861;¹ and the refusal of the convention to lay the returns before that body brings out the fact that at least twenty-three cooperationists thought it worth while to demand the returns, even after the majority of them had signed the Ordinance of Secession three weeks before.

Even, however, if we should accept the theory that the cooperationists had been elected by a majority vote, we must avoid sharply the error of supposing that the majority of the voters in Louisiana were opposed to the secession of the State. This would be to misunderstand the general position of the cooperationists. They were not battling against secession. Their position is clearly stated in the motion of J. A. Rozier, given above. Only a few members of the convention seem to have agreed with James A. Taliaferro, who declared that "the proper status of Louisiana is with the border States with which nature has connected her by the majestic river which flows through her limits; and an alliance in a weak government with the Gulf States east of her is unnatural and antagonistic to her obvious interests and destiny." While he held the true theory from a commercial standpoint, he completely ignored the slavery question—the great inciting cause of secession—which bound Louisiana most closely to the Gulf States. Moreover, it is clear that both inside and outside the convention the illogical character of the cooperationists' position became more apparent every day, and the cooperationist members of the convention, except in a few cases where they had pledged themselves to their constituents not to change, were won over to their opponents' views and signed the ordinance.

The enthusiasts for immediate secession had begun, too,

¹ "It now appears that the popular vote in Louisiana is some 300 or 400 majority against secession, and yet the Secessionists are two to one in the Convention." Purcell, M.S. Diary. Lent the author by Mr. Purcell.

to link the title of "Cooperationist" with that of "Submissionist," and though Christian Roselius protested against the confounding of two distinct things, the slur had an important influence on public opinion. Already, on January 9, the New Orleans Delta was quoting a letter recently written by Senator Judah P. Benjamin in which he said: "The North means war. I trust our Convention will not hesitate a moment about immediate secession. *That is Cooperation now.*" Among the newspapers the Picayune had rung the changes on cooperation, but by January 12 the Picayune, the Bulletin, the Crescent, the Bee, and the Delta were a unit against every form of coercion;¹ and the Creole Bee,² quoted in the Delta of January 8, had struck the true note when it declared: "Whether the Cooperationists or Secessionists win in the elections now going on, it will not strengthen the Union a tithe of a hair. The destiny of Louisiana is linked with that of her sisters of the South." The formation of the immediate secession sentiment had been hurried on by the logic of events. The voice of Roselius was "the voice of one crying in the wilderness." It was the voice of a Whig when the Whigs had ceased to exist.³ If any one, after considering the facts just mentioned, still doubts whether the majority of the white people in Louisiana were ripe for secession in one form or another in February, 1861, his doubts will vanish when he reads of the wave of enthusiasm for separation from the Union which swept over the whole State after the fall of Fort Sumter, in April, 1861. Not to follow Beauregard, a favorite son of the State, in that momentous step was treason to Louisiana. As early as January 29 even Mr. John Purcell, a Unionist, and later a member of the Republican convention of 1864, was writing in his diary, "I am myself drifting into secession ideas." Public opinion, halting at first on account of the love of the Union, was rushing

¹ Delta, January 12, 1861.

² L'Abeille, published in French.

³ Speech of May 30, 1860, in the Picayune of that date.

rapidly toward States' Rights doctrine in the late winter and early spring of 1861.

There seems to have been a general impression in Louisiana that the Federal government would not resist the withdrawal of the Southern States,¹ that "the erring sisters would be allowed to go in peace," but such was not the belief of Governor Moore. He believed coercion would be tried; and some days before the convention met he thought it would be wise to take possession of the United States military depot at Baton Rouge, and to occupy with state troops Fort Pike on the Rigolets and Forts Jackson and St. Philip on the Mississippi. In every case, he stated to the legislature, he had given receipts for the property found, in order to protect the officer dispossessed and to facilitate the future settlement with the Federal government. The South properly held that the forts and their stores belonged partly to the South, and to leave them to the North would be unfair.² On March 7 the convention passed an ordinance transferring the specie in the mint to the Confederate government. The amount was \$536,000.³

The view taken by Governor Moore, that there was danger of coercion on the part of the North, was shared by Major P. G. T. Beauregard, of Louisiana, who returned to his native State from the North about this time. Beauregard had been appointed superintendent of the Military Academy at West Point in November, 1860, but he had announced that if Louisiana seceded, he would resign his position in the army. After he had discharged his duties as superintendent for a few days, in January, 1861, he was ordered back to New Orleans by the secretary of war. Here he found excitement and enthusiasm on every hand but a general feeling that there might be a peaceable withdrawal. Beauregard, fresh from the North, where he had

¹ Roman, *Military Operations of General Beauregard*, I, 16.

² The governor of Mississippi asked that the spoils of Baton Rouge be divided; and Louisiana sent him 8000 muskets, 1000 rifles, 6 twenty-four pound guns, and a considerable amount of ammunition. Garner, *Reconstruction in Mississippi*, p. 9.

³ S. S. Cox, *Three Decades*, p. 115.

been able to gauge public opinion, expressed grave doubts as to such a possibility.¹

Still, the South was prepared for the issue, whatever it might be. She failed to understand that the North was readier and stronger than she in every way, and that the spirit of the time was hostile to the continuance of slavery. Holding that slavery was justifiable in the eyes of God and man, she had been more and more exasperated, as the years passed, by what she regarded as the "holier than thou" attitude of the extremists on the other side of Mason and Dixon's line. How could the North assume the "holier than thou" attitude when she remembered that in 1833 Prudence Crandall had been prosecuted and imprisoned for teaching a school of colored children in Canterbury, Connecticut, and William Lloyd Garrison had received worse treatment in Boston from the best citizens there, as he stated, than he would have received in Charleston or New Orleans?² The Constitution protected slavery, and yet this great instrument, which had once more become a fetish in the South, had been declared by the followers of Garrison to be a "covenant with death and an agreement with Hell," and this because slavery existed in the South and wished to extend itself into the territories. Was the "higher law" to be flaunted in the face of the South as if that section could appreciate only the law of expediency?

The election of the Republican candidate, the South believed, meant the destruction of slavery. Benjamin had said the Republicans would not kill slavery but would gird it about and make it die. It is true that the Republican platform proposed to shut slavery out of only the territories, and in his inaugural address, on March 4, Lincoln was to say: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe

¹ Roman, General Beauregard, I, 16.

² "Abolitionists were hunted by mobs; but they were not hunted so much because they were abolitionists as because the great body of people at that time believed that the agitation of the slavery question would jeopard the Union." Cox, *Three Decades*, p. 51. But was this true of Prudence Crandall?

I have no lawful right to do so; and I have no inclination to do so;" but Seward, in 1858, had spoken of the "irrepressible conflict," and Lincoln himself had declared that the country could not "remain one half slave and one half free, 'a house divided against itself'; it must become wholly slave or wholly free." Thus he had spoken in his great debate with Douglas, and the South took him at his word. His inaugural address, though not satisfactory to the Southern States, was more conservative than his utterances in the past had led them to expect; but when it was delivered seven States had already seceded, and the Congress of the Confederate States, on February 4, had met at Montgomery, and had elected Jefferson Davis and Alexander Stephens president and vice-president of a new confederacy.

As for Louisiana, on the very day that the Southern Congress met at Montgomery, the congressmen from Louisiana, Miles Taylor, Thomas J. Davidson, and John M. Landrum,¹ retired from the lower house and John Slidell and Judah P. Benjamin from the Senate. Both Slidell and Benjamin delivered stirring addresses in the august body of which they were members. As one reads these speeches, in the Congressional Globe of February 5, 1861, one may judge of the attitude of the Senate by the fact that Slidell used as the text of his farewell address the Ordinance of Secession recently passed in Louisiana, which he requested the secretary to read aloud. Slidell's address was temperate and well considered, though it sounded a note of defiance.² He said a new confederacy was to be formed, which would assume its proportion of the national debt and account for all the forts seized by the South in self-defence. "We offer you peace or war," he continued, "as you choose," and he humorously described the battle of Fontenoy in which the English Hay cried out to the French Guard to fire first, but the French refused to accept this courtesy, and when the

¹ John E. Bouligny did not retire, his action meeting with much disapproval.

² Blaine finds Slidell "aggressively insolent." Blaine, *Twenty Years of Congress*, I, 248.

English began the battle utterly defeated them. He also prophesied the destruction which awaited the commerce of the North at the hands of southern privateers.¹ Turning then to the causes of secession, he said it was the work of the people; that in the convention only four or five did not admit the necessity of separation. "We separate," he said, "because of the hostility of Lincoln to our institutions. . . . If he were inaugurated without our consent there would be slave insurrections in the South."

Benjamin combined logic and eloquence in his address, which followed that of Slidell. "It had been maintained," he said, "that Louisiana, having been purchased from France, had not the same right to secede as the 'original thirteen.' " He confuted this statement by quoting the treaty with France, and argued from it that once in the Union, Louisiana had the same rights as Virginia.² He ended with a burst of eloquence, declaring that the South was in rebellion, but it was a rebellion such as John Hampden led in England and George Washington in America. He was listened to with keen attention, not only on account of his eloquence, but because he was the exponent of the extreme southern view, and it was believed that to him was due the advanced position taken by the South in 1858 and 1859 against Douglas.³ The *New Orleans Daily Crescent* of January 16, 1861, has a letter from a correspondent describing Benjamin as he made this speech. "He stood in a simple position between two desks, one foot crossed over the other, no attitude, no gesture . . . only his black eyes

¹ S. S. Cox says: "The writer heard his [Slidell's] savage and sneering threat to destroy the commerce of the North by privateers. As he delivered it, his manner was that of Mephistopheles, in one of his humors over some choice anticipated deviltry." *Three Decades*, p. 70.

² Charles Gayarré had used the same argument in the *New Orleans Delta*, January 10, 1861. The position taken by Benjamin is fiercely but unsuccessfully attacked by Blaine. *Twenty Years*, I, 249-253.

³ Blaine, *Twenty Years*, I, 160. Schouler says, "Contemporaries had said at the outset that Toombs was the brain of this Confederacy; but that title, as events developed, belongs rather to Attorney-General Benjamin, the ablest, most versatile, and most constant of all Davis's civil counsellors." *History of the United States*, VI, 89.

showed the emotion he must have felt. They were elongated as Rachel's sometimes became, when at her stillest, most concentrated points of acting—the quiet curse of Camille, for example—scintillating with light, a faint smile, just a little scornful. He closed with, 'An enslaved and servile race you can never make of us, never, never, never.' This reiteration of the word 'never' was as free from emotion as if he had been insisting on some simple point of law which could not have been decided in a different way; but free from emotion as it was, it produced the greatest effect. The whole gallery on all sides burst out in one voice in uncontrollable applause."

Events now hurried on, and in April, 1861, when Beauregard of Louisiana fired the fatal shot at Fort Sumter—a shot which if it was not heard "round the world," at least reverberated through the United States—the North was aroused to coercion and the South to resistance, and the sections were solidified against each other. Lincoln's attitude on secession, if not on slavery, was clear: he would preserve the Union at all hazards. His call for seventy-five thousand volunteers electrified the North. Both sides prepared for a war which it was expected would last six months at the longest, but which proved to be one of the most fearful conflicts recorded in history, and which dragged its weary length along for four years.

It was Beauregard, a Louisianian, who opened fire on Fort Sumter, and Louisiana's rally to the support of her brilliant son has already been referred to. Her pride kept pace with her indignation. All writers of that day testify to the enthusiasm which swept over the State when Governor Moore called for volunteers "to resist invasion." Doubting Thomases disappeared. The feeling in the country parishes is illustrated by a letter from Baton Rouge, May 2, 1861. "From every quarter of the State the same enthusiastic cry 'to arms!' resounds, and no one remembers when such a whirlwind of united patriotic feeling has swept over Louisiana. . . . *Later.* A painful rumor is prevalent

that the quota of troops required of Louisiana is filled to overflowing and that no more troops will be received. If this proves true, it will be a bitter disappointment to thousands throughout the State who were making their arrangements to leave."¹ The strongest rebels of course were the women, and the war could not have lasted long without the support of sympathy and sacrifice which they offered throughout the struggle. Mrs. Merrick² says that after the States seceded a Union woman could not be found in the entire South. Butler³ declared that the loudest secessionists in Louisiana were people of northern birth and education. Several of the female teachers in public schools, among the most zealous in teaching their pupils to chant songs of secession and insult Union soldiers, were found to be natives of New England. "Renegades," he said, "are more zealous than the hereditary adherents of a bad cause."

There was no thought as yet that Louisiana herself might be invaded. All recognized that if "invasion" was to be resisted, the first battle-ground would be the border State, Virginia, and the Louisianians were hurried "to the front." The "Tigers" of the Pelican State won fame for themselves at Bull Run. The Louisiana Artillery—their mission consecrated, as they believed, by the most eloquent divine of New Orleans, Dr. Palmer—departed in May, 1861, amid the huzzas of thousands of enthusiastic spectators.⁴ Eleven

¹ For an account of enthusiasm in New Orleans see Roman, *Beauregard*, I, 16.

² Merrick, *Old Times in Dixie Land*, p. 29.

³ Parton, *General Butler in New Orleans*, p. 562.

⁴ Dr. A. P. Dostie says that during the Breckenridge campaign unionism with such men as Randall Hunt, Christian Roselius, Thomas J. Durant, and Pierre Soulé, "assumed a bold front, and little fear was entertained for the State of Louisiana until the Rev. Dr. Palmer sacrilegiously preached disunionism from his pulpit. Then the parricides assumed a courage and confidence fearful in its influence for evil." Dr. Dostie was so pronounced in his Union sentiments that he was forced to go North. When a deputation called on him to announce his expulsion, he asked to see the writ by which he was expelled. They answered that the government had made up their minds to do nothing illegal, so they issued no illegal writs, and simply "intended to make him go of his own free will." Gen. D. E. Twiggs, major-general commanding, gave him a pass on August

months passed, the war raged at a distance from the Gulf, and the Confederate government failed to appreciate that New Orleans was the emporium of the South, the key of the great highway of the Mississippi Valley. If New Orleans were lost, would it be possible to hold the Mississippi? And if the control of the river were lost, could the Confederacy maintain itself?

The defences of New Orleans at this time consisted of some three thousand men under General Mansfield L. Lovell, encamped near the city, and some weak batteries at the Rigolets, Barataria Bay, and other inlets; but the safety of the city rested chiefly upon two strong forts, Fort Jackson and Fort St. Philip, about thirty miles above the mouth of the Mississippi. Above these forts, which had together one hundred guns, were eighteen war-vessels, and below was an obstruction of mastless vessels chained across the channel. In each fort were nearly seven hundred men. While the exigencies or the want of foresight of the Confederate government left the city inadequately protected, the Federal government, like the British government in 1814, saw the immense importance of capturing the southern metropolis, and expeditions were set on foot with that end in view during the spring of 1862. One was to come down the Mississippi and another was to ascend the river and meet it. No more important naval operation was undertaken during the war, and no more capable officer could have been placed

21, 1861: "Dr. A. P. Dostie . . . wishes to return to New York under the Alien Law. Allow him to pass through the Confederate States." Dostie writes that he left in August, 1861, and that before he left "a reign of terror was inaugurated; liberty of speech was proscribed. He was considered a bold and rash man who still advocated the cause of his country. . . . My assistant, Dr. Metcalf, from Kalamazoo, Michigan, was incarcerated in a loathsome prison as early as last April," for expressing Union sentiments. Reed, *Life of Dostie*, pp. 21-30. Dostie returned to New Orleans after the capture of the city, when it was once more safe for him, and played an important part as an incendiary orator on the radical side. He was killed in the riot of 1866.

C. P. Dimitry told the author that it was currently reported in New Orleans that Hannibal Hamlin was a negro. A merchant who offered for sale medals with likenesses of Lincoln and Hamlin was nearly mobbed. Bob Ogden saved him.

in charge of the principal one of these two expeditions than David G. Farragut.

It was on the 24th of April, 1862, that Farragut, having broken down the obstruction below, succeeded in running the gauntlet of forts and fleet alike. Though the feat was accomplished during the night, the peril of the passage is shown by the fact that his own flagship, the *Hartford*, was struck thirty-five times in hull and rigging, and was at one time set on fire by the burning rafts sent down by the Confederates. But nothing could check the onward sweep of the Federal fleet; within an hour the forts were passed amid a hail of shot and shell, the protecting fleet was scattered, and soon New Orleans lay at the mercy of the victorious Farragut. It is not proposed to describe the exciting scenes which followed the arrival of the Federal fleet and the withdrawal of Lovell. Angry and defiant at first, the city could do nothing but submit. A portion of Farragut's fleet, proceeding up the Mississippi, forced Baton Rouge, the capital of Louisiana, to surrender, and running the gauntlet of the batteries at Vicksburg, joined the Federal fleet which was descending the river. An attempt of the Confederates to recapture Baton Rouge ended in failure. Port Hudson, however, was fortified and held until the fall of Vicksburg in July, 1863. With the surrender of Vicksburg the Mississippi "flowed unvexed to the sea." It is hard to estimate the injury which this brilliant exploit inflicted upon the Confederate cause. New Orleans served as a point of departure throughout the war for the military expeditions fitted out by the Federals in the far South. The fatal weakness of the Confederacy is nowhere so clearly shown as in its inability to recapture this city.

In the meantime, the so-called Trans-Mississippi Department of the Confederacy, consisting of Missouri, Arkansas, Texas, Louisiana, and some of the territories, had been put under the charge of the Confederate Lieutenant-General E. Kirby Smith, in March, 1863. Under him was General Richard Taylor, son of General Zachary Taylor. General Taylor carried on a fairly successful campaign against the

Federals in southwestern Louisiana before the fall of Vicksburg, and even after that disaster he did not despair of holding western Louisiana. It was in the spring of 1864 that the Federals made up their minds to lead a strong force up the Red River, and, crushing all opposition, to march into Texas. This force consisted of seventeen gun-boats under Commander D. D. Porter, which ascended the Red River and protected 10,000 men under General A. J. Smith. Another Federal army under General Franklin, numbering 18,000 men, marched up the Teche to join General Smith at Alexandria. The commander-in-chief of this powerful army was General N. P. Banks, whom, if he was not a skillful general, we shall find to be a most astute politician.¹

Taylor fell back before this strong force, but finally made a stand at Mansfield, April 8, 1864. Here his army consisted of 5000 horse, 3300 infantry, and 500 artillerymen. The first division of Banks's army that arrived on the scene consisted of 5000 men, but others came up rapidly. The Confederates succeeded in defeating each division as it arrived, and captured "2,500 prisoners, 20 pieces of artillery, several stands of colors, many thousands of small arms, and 250 wagons."² On the following day, when the Federals occupied a strong position at Pleasant Hill with 18,000 men, another battle was fought. Both sides claimed a victory, but at nightfall the Confederates seem to have been in possession of the field, and the account of Admiral Porter declares that the whole expedition was for the Federals a complete failure. In any case, Banks retired to Alexandria, and finally crossed the Atchafalaya on May 20. Here the Confederates gave up the pursuit. There was no more fighting in Louisiana, but at the end of 1864 the Confederates were still so strong that there were three fourths of the State to which it was not safe for the Federals to send military supplies. Four months later General Lee surrendered at Appomattox, and the war was over.

¹ Annual Cyclopaedia, 1864, subject "Army Operations," p. 51.

² General Taylor's report. The Annual Cyclopaedia, 1864, gives Banks's force as 8000 and his loss as 2000 killed, wounded and missing. Subject "Army Operations," p. 53.

CHAPTER II.

BUTLER'S ADMINISTRATION.

From May 1 to December 14, 1862, New Orleans was under the control of General B. F. Butler, with a force of 15,000 men.¹ It was a comparatively short period, but Butler in this brief time contrived to make himself the best hated man in the South; and by one particular act he even won notoriety for himself in the English Parliament. It was, of course, a difficult task to govern wisely and tactfully a great city like New Orleans, which had been occupied by a victorious army, and which was inhabited by an exasperated people. In his civil as well as in his political administration Butler instituted the system of "thorough" which made Lord Strafford so unpopular in the reign of Charles I. In fact, his political administration, in its unbending severity and its total disregard of the feelings of those whom the chance of war had placed in his power, reflects methods of military occupation which had been obsolete for several centuries.

His civil administration has met with much encomium. It is claimed for him that he warded off starvation from the poorer classes,² cleaned the city thoroughly, established strict quarantine laws, and kept out the dreaded yellow

¹ In a speech at the North, Butler said he had 2500 soldiers to support him; so he does not seem to have kept the 15,000 in the city. Parton says Butler had an inadequate force to defend the city against an attack because of the strong garrisons necessary at Ship Island, Fort Jackson, Fort St. Philip, Baton Rouge, posts on the lake, and elsewhere. Butler in New Orleans, p. 436. Butler was major-general commanding the Department of the Gulf, with headquarters at New Orleans, while Major—afterwards General—George Foster Shepley, who was appointed military governor of Louisiana in June, 1862, and remained such until Hahn was elected, was evidently under Butler.

² He assessed rebels to aid the poor, and collected \$340,000. In his farewell address he says he spent about a million which he had collected—doubtless by confiscation.

fever.¹ It is only proper, however, to state that great numbers of the inhabitants were absent in war, or as refugees, and that the diminution of traffic in the city made the problem of cleanliness far easier than ever before; while the embargo on foreign trade during his administration simplified greatly the problem of keeping out the fever. There were two reported deaths under Butler, but who saved New Orleans in 1861 when there was not one reported death or case, and when blockaded New Orleans was occupied by Lovell and his very many non-immune Confederate soldiers, who enforced no preventives of any kind?² Moreover, it has been noted by a competent critic that when Butler took charge, "there had been no epidemic of yellow fever for four years. The year of his domination was actually less healthy than the year before, its death-rate being thirty-six, against thirty-four for 1861."³ Can it be that the cleansing of New Orleans is inimical to the health of its people? However, Marion Southwood notes the fact that there was a large number of unacclimated persons in New Orleans in 1862, and from inability to get away a greater proportion of the population than usual remained through the summer; she also says Butler "was the best scavenger we ever had among us."⁴

But "thorough" in civil administration did not satisfy Butler. Coarse by nature, and lacking totally the tact which distinguished his successor, General Banks, he proceeded to exercise a petty tyranny in the suppression of all disloyalty of word or act. Although he permitted the municipal authorities of New Orleans to continue their functions for a while under strict surveillance, the city was practically under martial law. The newspapers which had been too active in

¹ Butler said there was but one reported case of yellow fever in New Orleans in 1862; "its mortality returns show it to be *the most healthy city in the United States*." Parton, *Butler in New Orleans*, p. 401.

² Chaillé, "Yellow Fever," *New Orleans Med. and Surg. Jour.*, July, 1870, pp. 563-598.

³ Cable, *Creoles of Louisiana*, p. 306.

⁴ Southwood, *Beauty and Booty*, p. 182.

reporting Federal losses were shut up until their columns promised to be entirely colorless. The Delta, "noted for the virulence of its treason," was seized and became Butler's own organ. The schools were reorganized after the model of Boston; all secession teachers and books were banished. Churches where the clergymen omitted to pray for the president of the United States were promptly closed; numerous arrests were made of those who, to avoid passing under the United States flag hanging over the banquettes, preferred to walk in the middle of the street; and some of the leading citizens were put in close confinement at Ship Island or at Fort Lafayette, New York. Finally, when some of his agents complained that the ladies of New Orleans insisted on playing secession airs on the piano, and even feigned nausea when Federal officers passed by, Butler, acting on his maxim that "the venom of the she-adder is as dangerous as that of the he-adder," issued his notorious Order No. 28.¹ This order was condemned in the British House of Peers as without a precedent in the annals of war; but Butler no less strenuously defended it on the ground that it effectually stopped all insults to his soldiers, and that no lady would be guilty of the misdemeanors which the order was intended to punish.

Butler's eulogist, Parton, praises Butler's honesty, his lofty sense of honor, and his splendidly efficient service in the city. His brother, according to Parton, made a fortune in New Orleans, but General Butler himself speculated only for the benefit of the United States government, whose

¹ The order was as follows:—

"Headquarters, Department of Gulf, New Orleans.

"As officers and soldiers of the United States have been subject to repeated insults from women, calling themselves ladies, of New Orleans, in return for the most scrupulous non-interference and courtesy on our part, it is ordered hereafter, when any female shall by mere gesture or movement, insult, or show contempt for any officers or soldiers of the United States, she shall be regarded and held liable to be treated as a woman about town plying her avocation."

Annual Cyclopaedia, 1862, subject "New Orleans," p. 647.

coffers were enriched by his sagacious seizure of commercial opportunities.¹ Denison, however, seems convinced that Butler speculated on his own account and obtained large profits from the sale of salt and other articles to the Confederates.² The better classes in New Orleans generally condemned him as a petty tyrant, who insulted ladies and gentlemen alike, and who even descended to the appropriation of silver spoons in order to increase his private fortune.³ To them, his forcing the oath of allegiance on men and women alike was an act of oppression, and his general behavior to the inhabitants of the conquered city justified his soubriquet of "Beast Butler."⁴ The same view seems to be taken by a northern historian who says: "In one way or another Butler laid here [in New Orleans] the foundation of wealth which subserved his later ambition in politics. . . . Ill fitted for conqueror, he posed as avenger."⁵

No finer opportunity for the humiliation of rebels was ever vouchsafed to a northern general than was presented by the passage of the so-called confiscation act, and perhaps by none was it more thoroughly appreciated than by General Butler. This act was passed by the Federal Congress against vigorous opposition, and was approved by the president July 12, 1862.⁶ After declaring that the property of five classes of rebels—the various classes holding civil or military offices under the Confederate government—should be confiscated, the act goes on further to provide that the property should be seized of all those who "aiding, countenancing, or abetting the Rebellion should not return to their

¹ Butler in New Orleans, pp. 408-411.

² Diary and Correspondence of S. P. Chase, Ann. Rept. Amer. Hist. Assn., 1902, II, 320-327.

³ The receipt given Butler for a box of silver deposited in the Citizens' Bank is still shown in Memorial Hall, New Orleans. It is related that when Butler left New Orleans, an old negro mammy shouted after him, "Good-bye, honey, you never stole nothing from me!"

⁴ By means of the negroes Butler had "a spy in every house, behind every rebel's chair as he sat at table." Parton, Butler in New Orleans, p. 493.

⁵ Schouler, History of United States, VI, 259.

⁶ Annual Cyclopaedia, 1862, subject "Congress, U. S.," pp. 349-374.

allegiance in sixty days."¹ As the belligerency of the Southern Confederacy was acknowledged in 1861 by several foreign nations and in many respects by the Federal government itself, the South resented bitterly any action that seemed to regard her as merely a rebellious section of the country.

In fact, before the passage of the confiscation act the feeling between the two sections had been exacerbated by two measures, adopted, one by the Federal and the other by the Confederate Congress. By act of August 3, 1861, the Federal government confiscated all property used in aid of the insurrection and declared that owners should forfeit all claims to slaves whose labor was used in any service against the United States. Crittenden, of Kentucky, opposed this measure, declaring that such a policy would only stimulate the adversary to still more desperate measures. In fact, retaliation followed quickly. Later in the same month the Confederate Congress passed an act declaring that all lands, goods, and credits owned by any alien enemy were sequestered by the Confederate States, and held as an indemnity for all who should suffer under the Federal confiscation act.² This retaliatory act, though it could be justified by the rules of international law,³ was regarded with great bitterness in the North; and, of course, Butler, when he was in com-

¹ Much international law can be quoted against this act; but except in ordinary operations in the field, the United States did not give the "States in rebellion" the benefit of international law. Cox says: "The confiscation acts of the Thirty-seventh Congress, and certain other acts, were in effect bills of attainder as the term is understood in the Constitution. The radicals sought by these acts, to impose pains and penalties on certain classes of the people of the South without previous ascertainment of criminal guilt in the judicial courts. . . . There must first be a criminal conviction as a foundation for confiscation. . . . The utmost extent of their vindictive policy was confined to seizure of property, and to proceeding *in rem* for its condemnation." *Proceedings in rem* require no jury. *Three Decades*, p. 249.

² *Statutes at Large of the Provisional Government of the Confederate States*, p. 201.

³ Boyd's Wheaton condemns it, but the annotator is mistaken, it is not condemned by Wheaton himself. The custom is becoming obsolete, but "the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property." Wheaton, *Elements of International Law* (Boyd), p. 421.

mand in New Orleans, compelled the payment of all debts due to Northerners.¹

It has been maintained that perhaps in no part of the South was the confiscation act so rigidly enforced as in Louisiana.² Even before the confiscation act of July 17, 1862, was passed by Congress, Butler ventured to sequester the estates of such prominent rebels as Twiggs and Slidell³ on the ground that they were officers of the Confederate government. He made himself free with such private residences as he needed for his accommodation and that of his staff; and he forced rich merchants in New Orleans, who had contributed to the support of the Confederacy, to contribute a certain percentage of the same amounts to the support of the poor and indigent in the city.⁴

Finally, on September 24, 1862, the sixty days prescribed in the congressional confiscation act having elapsed, Butler issued an order that all persons, male or female, eighteen years and over, must register, with a description of all property owned. This order included "all those who have ever been citizens of the United States and have not renewed their allegiance previously, or who now hold or pretend any

¹ Cox says that as early as May 21, 1861, all goods and credits of citizens of the United States were sequestered by the Confederate Congress. *Three Decades*, p. 247. Debts were not confiscated May 21; the debtors were authorized to pay them into the Confederate treasury, which was to pay the debts after the war; but August 8, 1861, the Confederate Congress passed an act not simply to suspend payment during the war, but to seize said debts for good. This was held to be unjust.

² Cox, *Three Decades*, p. 434. As a clause of the Federal Constitution was interpreted to declare that forfeited property could be held only during the lifetime of the traitor or rebel, many of the Confederates on their return regained their real estate at a fair price from the purchasers.

³ Parton, *Butler in New Orleans*, p. 467. The first act of the Federal Congress authorizing the seizure of all property of rebels after sixty days' notice was passed July 17, 1862.

⁴ In order to give the inhabitants of New Orleans a visible reminder that the old hero of Chalmette would have condemned their present attitude on secession, Butler sent workmen to Jackson Square and caused to be engraved on the base of the statue the famous toast of Jackson in 1830, "Our Federal Union; it must be preserved."

allegiance or sympathy with the Confederacy." The latter class, on registering, were to receive certificates as claiming to be "enemies of the United States." Any person neglecting to register was to be subject to fine or to imprisonment at hard labor, or to both, and all his or her property confiscated by order, as punishment for such neglect.¹ Thus compelled, somewhat less than 4000² registered themselves as enemies, and many of these left the city, while 61,382 took the required oath of allegiance. To force women to take the oath or declare themselves enemies of the United States was regarded as a great outrage. Many persons refused to take any oath at all, but "many took it," says a lady who was present in New Orleans at the time, "contrary to every conviction of honor and right, and were led to embrace the doctrine that a compulsory oath was not binding—the morality of which, to say the least, is somewhat doubtful."³ An Episcopal minister in the city wrote to Butler requesting him not to enforce the oath, as it was an inducement to perjury, but the commanding general refused to forego the right of insisting on the conscience test. A large amount of property belonging to persons who were absent in the Confederate army and who were thus unable to take or refuse the oath was promptly seized and sold.⁴ Besides his con-

¹ W. L. Robinson was a registered enemy of the United States in 1862, and his house in New Orleans was assigned to Federal officers. He returned in 1865, took the oath, and applied for the return of his furniture. But General Canby refused, because he had no right to take the oath. He needed pardon. *Times*, October 21, 1865. Judge Seymour says that property of registered enemies was not confiscated because they were mostly young men and had none. This seems to show that, as Miss King says, the property of registered enemies was not confiscated, though *Annual Cyclopaedia* says, "Furniture, gold, and silver plate . . . from houses of rich absentees and registered enemies of the United States" were confiscated. 1865, subject "Louisiana," p. 515. Dr. Mercer, a prominent physician, asked to remain neutral, but Butler said "No," and Mercer registered as an "enemy of the United States."

² Parton, *Butler in New Orleans*, p. 474.

³ Marion Southwood, *Beauty and Booty*, p. 159.

⁴ The Rules of War drawn up by Francis Lieber, a distinguished jurist, and issued in 1863, left it to the discretion of the commanding general whether to require an oath of allegiance or not. Though this might still be required in cases of rebellion, for international warfare The Hague Peace Conference of 1899 drew up the fol-

fiscation in New Orleans, Butler sequestered, on November 9, 1862, all property in the so-called Lafourche district (all Louisiana west of the Mississippi except Plaquemines and Jefferson parishes) on the ground that disloyal persons there were trying to dispose of their property and thus defraud the United States. He ordered that all the personal property of this district should be brought to New Orleans and sold at auction. If there were any error as to loyalty and the "sheep were not properly distinguished from the goats," the sheep could make reclamation later.

What became of the large sums realized from the sale of confiscated property it seems impossible to say. Parton claims that the confiscation in Louisiana added \$1,000,000 to the treasury of the United States;¹ but another authority says confiscations in New Orleans amounted to little in money. "The defaulting quarter-master here turned over \$75 as the total net proceeds of the sales of all the splendid Paris-made furniture, gold and silver plate, . . . taken from the houses of rich absentees and registered enemies."² Judge Durell says: "The net proceeds of property adjudged to United States will be only \$100,000. . . . Harpies who have done nothing but make money out of both parties during the war profit by confiscation; the government does not."³

During the summer of 1862, under the fostering care of General Butler, who was more of a politician than a warrior, at least one meeting of the so-called "Union Party" was held in New Orleans.⁴ It is related of General N. P. Banks

lowing rule: "Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited." Scott, Hague Peace Conference, II, 135.

¹ Butler in New Orleans, p. 584. Butler says the same. Autobiography of Butler: Butler's Book, p. 522.

² Annual Cyclopaedia, 1865, subject "Louisiana," p. 515.

³ Butler says there was "turned over to General Banks nearly eight hundred thousand dollars in cash and unsold property. . . . What was done with that money and property I have not found in any of the reports of General Banks." Butler's Book, p. 522. In 1864 the Freedmen's Bureau held some eighty plantations "liable to confiscation."

⁴ As early as July 31, 1862, Lincoln wrote to August Belmont that

that when he occupied New Orleans in December, 1862, he said, "I could put all the Union men in New Orleans in one omnibus."¹ But this story is either apocryphal or Banks was densely ignorant of the conditions existing in the city. Many of the Douglas men were affiliated with Butler, and large numbers of the Irish laboring class and other foreigners declared for the Union as soon as Butler's coming made it safe. It was but natural, moreover, that many who had no love for the Union were won over to that side by the emoluments, perquisites, and favors showered on Union men and by the restrictions placed upon sympathizers with secession.² Dr. A. P. Dostie and J. Madison Day, both to be prominent at a later time, were the orators put forward to arouse Union sentiment.³ By December 3, 1862, public sentiment for the Union had so far crystallized that on that date an election for two congressmen from New Orleans was held. The election was ordered by General Shepley, military governor of Louisiana. He acted with the permission of Lincoln, who insisted, however, that "to send a parcel of Northern men here as representatives, elected, as would be understood (and perhaps really so), at the point of the bayonet, would be disgusting and outrageous."⁴ One secessionist, Dr. Thomas Cottman, came forward as a candidate; but Butler persuaded him to retire on the ground

he was anxious to have Louisiana "take her place in the Union as it was, barring the already broken eggs." Chase Correspondence, p. 297. Hence there is more than chronological connection between the preliminary proclamation of September 22 and the election of Hahn and Flanders.

¹ Merrick, *Old Times in Dixie Land*, p. 27.

² Parton, *Butler in New Orleans*, p. 596.

³ G. S. Denison writes Chase that Flanders, Judge Heistand, Judge Howell and Fernandez undertook to arouse Union sentiments. Their families were slighted and themselves isolated, but they persevered. R. Hunt and Roselius held aloof, but Durant and Rozier helped. Chase Correspondence, p. 334.

⁴ Lincoln's Works (Lapsley), VI, 172. As an inducement to participate in the election use was made of the promise in the preliminary proclamation of emancipation, issued in 1862, to deem the fact that a State was represented in Congress on January 1, 1863, as conclusive evidence that such State was not then in rebellion, and subject to the proclamation.

that however good a Union man he might be at present, he had signed the Ordinance of Secession in 1861. "It looked," added the general, "too much like Aaron Burr's attempt to run for Parliament after he went to England to avoid the complications in the Mexican affairs, or his duel with Hamilton."

The election resulted in the choice of B. F. Flanders and Michael Hahn (neither a native of Louisiana, but both long residents) as congressmen from the first and second districts respectively.¹ Thus was the first feeble step made in the reconstruction of Louisiana, and the success with which it met seemed a good augury for the future. Flanders received 2370 votes out of 2543, and Hahn 2581, which was a majority over all competitors. Parton, who gives these figures, adds that the whole number of votes cast in the city at this election exceeded the vote for secession by 1000. The result was certainly an evidence that the Union party was growing. Flanders and Hahn were both allowed to take their seats in Congress, but as the Thirty-seventh Congress expired March 4, 1863, they did not long enjoy their honors.² That Louisiana should have had two congressmen sitting in the House of Representatives in 1863 when it was unrepresented in the Senate and the greater part of the State was in the hands of the Confederates may be regarded as a foreshadowing of Lincoln's plan of reconstruction to be put into practice a year later.

Soon after the election General Butler's term as commander of the Department of the Gulf was cut short for reasons best known to the government,³ and he was super-

¹ For sketch of Hahn, see p. 57.

² Cox has an amusing account of Hahn in Congress. *Three Decades*, p. 428. The vote admitting them was 92 to 44.

³ Butler does not seem to have known why he was superseded, and he was much disgruntled. Rhodes thinks it was largely due to his famous order. Rhodes, *History of the United States*, IV, 93, note. Denison writes: "It is not certainly known why Gen. Butler was removed. Some say it is on account of demands of France—others that it is on account of speculations—others that it is owing to representations of Admiral Farragut." *Chase Correspondence*, p. 340.

seded on December 14, 1862, by General N. P. Banks. The policy of government adopted by General Banks showed a radical departure from that of his predecessor, and his clemency seems at first to have encouraged some disorder in New Orleans, thereby justifying in the eyes of many the severity of Butler.¹ In any case, he suspended until further orders all confiscation of property;² and after consulting with Butler he released a number of political prisoners whom Butler had incarcerated in the forts of Louisiana, among them Dr. Theodore Clapp, a distinguished and beloved minister of New Orleans, who had been confined at Fort Pike.

In his farewell address, which exhibited the general as a skillful rhetorician, Butler declared that his name would hereafter be indissolubly connected with New Orleans—apparently a true prophecy; that he had governed the city wisely and leniently in the interests of the poorer classes and adversely to the rich aristocrats who had precipitated rebellion, which is treason, and treason persisted in is death. "Any punishment short of that due a traitor," he continued, "gives so much clear gain to him from the clemency of the government." Such harshness as had been used had been exhibited to disloyal enemies. "I might have regaled you with the amenities of British civilization" (this is the retort courteous to the House of Lords for its criticism of his notorious order); "and yet been within the supposed rules of civilized warfare. You might have been smoked to death in caverns, as were the Covenanters of Scotland by command of a general of the royal house of England; or roasted, like the inhabitants of Algiers during the French campaign; your wives and daughters might have been given over to the ravisher, as were the unfortunate dames of Spain

¹ Denison writes Chase, "Gen. Banks is regarded by them [the rebels] as a gentleman. This is not a good sign. . . . They like to be conciliated." Chase Correspondence, p. 361.

² Denison says: "The military commission [for sequestered property]—a corrupt concern—has ceased its operations." Chase Correspondence, p. 341. But Butler says this commission was investigated three times, and found all right. Butler's Book, p. 522.

in the Peninsular war; or you might have been scalped and tomahawked as our mothers were at Wyoming by the savage allies of Great Britain in our own Revolution; your property could have been turned over to indiscriminate 'loot', like the palace of the Emperor of China; works of art which adorned your buildings might have been sent away, like the paintings of the Vatican; your sons might have been blown from the mouths of cannon, like the Sepoys at Delhi; and yet all this would have been within the rules of civilized warfare as practised by the most polished and the most hypocritical nations of Europe. For such acts the records of the doings of some of the inhabitants of your city towards the friends of the Union, before my coming, were a sufficient provocative and justification."¹ Thus did the general in his farewell words attempt to soothe the injured feelings of the disloyal inhabitants by a recital of the dread punishments the infliction of which the arts of war justified, but which his clemency had spared them.² Butler's eulogist, Parton, was so carried away by the "noble" sentiments contained in this address that he determined forthwith to write a history of the general's sojourn in New Orleans.

¹ Parton, Butler in New Orleans, p. 602.

² Dr. Samuel Johnson used similar language in regard to the American rebels of 1776.

CHAPTER III.

BANKS'S ADMINISTRATION—1862—RECONSTRUCTION UNDER THE PRESIDENTIAL PLAN.

It was but natural that the election of Hahn and Flanders as representatives to Congress from that part of Louisiana lying within the Federal lines and their final acceptance at Washington¹ should encourage the Unionists in New Orleans to persevere in their efforts to secure still further self-government. In this laudable desire they were supported both by the military governor, Shepley, and by the new commanding general of the Department of the Gulf. Banks in particular was a born politician, and delighted in the holding of elections and the issuing of wordy proclamations marked by a certain eloquence. His deficiencies in the field found complete compensation in the political arena. But General Banks was not the only politician in Louisiana. There were a number of prominent men who were anxious, for one reason or another, to take part in any reorganization that might take place. Some were seekers after the plums of office; some were slaveholders who hoped that in spite of the proclamation of emancipation means might be found to protect the slaves of Unionists, original, or lately converted; some were in both the above-mentioned categories; while all the inhabitants of the city were desirous of escaping from the incubus of martial law.

The first distinct party to enter the field was the so-called Free State party, a radical association, which worked through the Union clubs which had been formed in New Orleans and in the neighboring parish of Jefferson. This party, which began an active campaign in 1863, adopted as a platform the general proposition that the state constitution

¹ Blaine says they were received "not without contention and misgivings." *Twenty Years*, II, 36.

of 1852 had been superseded by the secession constitution of 1861, and that the latter was null and void because the convention had no constitutional right to frame it. As the State had thus committed political suicide, this party held that the proper method of procedure was for loyal citizens to work out a new constitution in accordance with new conditions, calling on the Federal military government only for such protection as might be necessary. With this end in view, a registration was to be made by a civil commissioner in each parish then under control of Federal arms, wherein all those were to be registered who swore that they were citizens of the United States and had resided six months in the State and one month in the parish. After a "sufficient" number of citizens had been registered and a "sufficient" area embraced, the military governor should order an election for members of a convention to frame the new constitution. When this constitution had been adopted by such as were made voters, under its provisions an election of state officers was to be ordered.¹ While this party was in favor of abolishing slavery, it declared that representation in the convention should be based on a ratio of one delegate to every twenty-five hundred of the white population. Their objects in considering only the whites, they said, was to put themselves on an equality with the slaveholders; for in the first and second districts, where alone the Federal troops exercised control, the slaves had not been emancipated by Lincoln's proclamation of January 1, 1863, and thus slaveholders would be elected in disproportionate numbers unless a white basis were adopted.²

Consequently, a Free State general committee was finally appointed in the first half of 1863, its members consisting of five delegates from each of the Union clubs of Orleans and Jefferson. The Chairman was Thomas J. Durant and the

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 589.

² As we have seen above, the rule for representation in Federal affairs was that three fifths of the slaves should be counted. In Louisiana, for state offices, representation was based on total population, including slaves.

secretary was James Graham. Durant was also appointed attorney-general and commissioner of registration by Governor Shepley, with power to appoint registrars in the parishes and to conduct a new registration of loyal citizens who wished to organize a loyal government in Louisiana.¹ Two things only seemed to militate against the success of this party. The first was that it represented too small a part of the State, a part which, by the aggressive action of the Confederates, was confined at the close of 1863 to New Orleans alone. As the Confederates controlled so large an area it was a dangerous undertaking to register for any such purpose in one of the country parishes. The second was that there soon arose another party, composed chiefly of planters, who, claiming as much loyalty to the Federal government as did the Free State party, were yet anxious to reorganize the State on a different and more conservative basis.

According to the latter party, secession was to be repudiated, but the constitution of 1852 was to be revived with all its slavery features. They believed that Lincoln had emancipated the slaves in the rebellious parts of the country as a war measure, and as slavery remained intact within the Federal lines except as to the return of fugitives,² it might be reinstated everywhere at the close of hostilities; or, in any case, compensation might be obtained by loyal citizens through a decision of the Supreme Court. The plans and views of this party may be found explained in an interesting speech delivered in New Orleans on October 13, 1864, by J. L. Riddell.³ Riddell was a Union Democrat and a conservative, who, with Rozier, Fellows, Jerome, and others, favored the election of McClellan to the presidency in the autumn of 1864. In his address Riddell explained his position in 1863. He had cooperated with a large number of conservative Union men at that time to "loyalize" the

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 589.

² An article of war forbade the return of fugitive slaves.

³ New Orleans Times, October 21, 1864. Riddell was formerly Confederate postmaster. Chase Correspondence, p. 309.

entire States of Louisiana, Texas, Arkansas, and Mississippi, and to bring them squarely into their old places in the Union. In June, 1863, they asked Lincoln, through a committee composed of E. C. Mathiot, Bradish Johnston, and Thomas Cottman, to instruct Governor Shepley to permit the recurring biennial election to be held on November 3, 1863, under state laws (i. e., the constitution of 1852). Lincoln replied that since receiving this request, he had reliable information that a respectable portion of the people of Louisiana desired to amend the state constitution and contemplated holding a convention for the purpose. This fact was sufficient reason why the general government should not give the committee permission to act under the existing state constitution. "I may add," he continued, "that while I do not perceive how such a committee could facilitate our military operations in Louisiana, I really apprehend it might be so used as to embarrass them. As to an election to be held next November, there is abundant time, without any order or proclamation from me just now. The people of Louisiana shall not lack an opportunity for a fair election for both Federal and State officers by want of anything within my power to give them."¹

In spite of this letter, which, though conciliatory, showed the president's strong leaning toward the plans of the more radical party, Riddell seems to have continued his efforts, for, a little later, consultations were held with Cottman and other leading men in northwestern and northern Louisiana, then under Confederate control, as well as with prominent men in Texas, western Mississippi, and Arkansas. In the month of July, Vicksburg and Port Hudson had fallen, and there had been growing a feeling of general distrust as to the success of the Confederate cause. The gentlemen consulted expressed their willingness to resume their place in the Union, with the laws and constitution as before secession, except as affected by Lincoln's emancipation proclamation, the legality of which they were willing to leave to the decision of

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 590.

the Supreme Court. As the time for the election came first in Louisiana, it was agreed that Louisiana should lead the way, and if the movement should be favorably received by the Federal government,¹ the other States would follow.

Further details as to the plan to restore Louisiana to the Union while preserving the status of the negro as far as possible are to be found in the newspapers of the day. In October, 1863, the *Daily Picayune* contained an address to the loyal citizens of Louisiana signed by W. W. Pugh, president, E. Ames, vice-president, and J. Q. A. Fellows, secretary of the Executive Committee of Louisiana. This address urged the people on November 2 to vote for state and parish officers, members of Congress, and state legislature. "We think we can assure you," it ran, "that your action in this respect will meet with the approval of the National Government. The military will not interfere with you in the quiet exercise of your civil rights and duties. . . . Louisiana has always been at heart loyal to the United States. She never seceded by a majority vote. She was juggled and forced into the position of seeming rebellion, but in our opinion she was, and still is, one of the United States. Now that it is practicable, thanks to the gallant army and navy of the United States, her citizens desire to assume forthwith their old status and to replace the star of their State, with lustre bright as ever, on the glorious flag of our common country."

The collapse of the movement might have been predicted. The Free State committee, being invited to cooperate, refused on the ground that the constitution of 1852, as amended by the convention of 1861, was destroyed by the rebellion of the people of Louisiana, and that the present movement was consequently illegal and unjust. As General Shepley had estopped proceedings in the city, on November 3 elections were held in only the country parishes. On the 7th of November the *Times* (now radical) makes reference to this

¹ This seems to have been an appeal to Congress against the president.

election in a sarcastic article, and indicates that the movement, having but a small following, was arrogating too great importance to itself. A certain Colonel A. P. Field, who had "received 125 votes in one of the parishes, with two districts to hear from," and Dr. Cottman (said to have been a personal friend of Lincoln's) were elected to Congress. They stayed in Washington for a while, and even voted for the election of clerk of the House, but they were not recognized after the organization was effected.¹ Field, however, lingered on until Congress presented him with fifteen hundred dollars for his expenses and sent him home.² How the movers ever hoped to succeed in the face of the opposition of the president and the military governor, or to win the favor of Congress while they were unwilling to give up slavery, is hard to understand. The negro was becoming every day a more prominent feature in the great conflict. Even now he could not be ignored as a political factor, though he was not yet of decisive importance in this respect. When opportunity offered, as we shall see, he was not slow to urge his claims to equal rights.

The failure of the conservatives to secure recognition in Congress for their representatives seemed to open the way for the success of the Free State party. The party was all the time pushing on its work of reorganizing the State on what was termed "the fundamental principle of our government 'that all men are created free and equal,'"³ a principle which the conservatives evidently did not accept. That the president was on their side seemed to be shown not only by his letter to the conservatives in June, 1863, but also by a later letter to Banks, August 5, 1863, in which he said: "Governor Shepley has informed me that Mr. Durant is now taking a registry, with a view to the election of a constitutional convention in Louisiana. This, to me, appears

¹ Annual Cyclopaedia, 1865, subject "Louisiana," p. 509.

² Reed, *Life of Dostie*, p. 126.

³ This latter phrase is, of course, a misquotation of a phrase in the Declaration of Independence, which declares that "all men are created equal" (not free). It was borrowed by Jefferson from Locke's *Essay on Government*.

proper.”¹ It is true that in October, 1863, he told B. F. Flanders, then in Washington, that the work of registration was proceeding too slowly; and when Flanders showed how necessary the delay was, the president is reported to have said he would recognize and sustain a state government organized by any part of the population then controlled by the Federal power.² Still, the Free State party found it so difficult to win over adherents to its radical policy that registration by December, 1863, had not advanced far enough to justify the plans of that party. The registration was pushed on, however, and plans were made to obtain permission from Governor Shepley to hold an election on January 25, 1864,

¹ New Orleans Times, May 7, 1865. Lincoln's letter of this date is so interesting that it is quoted more fully:—

“While I very well know what I would be glad for Louisiana to do, it is quite a different thing for me to assume direction in the matter. I would be glad for her to make a new constitution, recognizing the emancipation proclamation, and adopting emancipation in those parts of the State to which the proclamation does not apply. And while she is at it, I think it would not be objectionable for her to adopt some practical system by which the two races could gradually live themselves out of their old relation to each other, and both come out better prepared for the new. Education for young blacks should be included in the plan. After all, the power or element of ‘contract’ may be sufficient for this probationary period, and by its simplicity and flexibility may be the better.

“As an antislavery man, I have a motive to desire emancipation which proslavery men do not have; but even they have strong enough reason to thus place themselves again under the shield of the Union, and to thus perpetually hedge against the recurrence of the scenes through which we are now passing.

“Governor Shepley has informed me that Mr. Durant is now taking a registry, with a view to the election of a constitutional convention in Louisiana. This, to me, appears proper. If such convention were to ask my views, I could present little else than what I now say to you. I think the thing should be pushed forward, so that, if possible, its mature work may reach here by the meeting of Congress.

“For my own part, I think I shall not, in any event, retract the emancipation proclamation: nor, as executive, ever return to slavery any person who is free by the terms of that proclamation, or by any of the acts of Congress.

“If Louisiana shall send members to Congress, their admission will depend, as you know, upon the respective Houses, and not upon the President.

Yours very truly,
A. Lincoln.”

—*Writings of Lincoln* (Lapsley), VI, 374.

² *Annual Cyclopaedia*, 1863, subject “Louisiana,” p. 591.

at which delegates should be chosen to a convention which should form a new constitution for the State.

In the meantime, Lincoln had been revolving in his own mind some feasible method of restoring the seceded States to their normal relations with the Federal government. There were two, or possibly three, theories held as to the status of seceded States. One was that by the act of secession a State placed itself entirely outside the pale of the Union and passed under the power of Congress as if it were a territory. Another theory was that a State might be "in rebellion" but that it could never, by its own act, be outside of the Union. In Congress, at a somewhat later period, there was a protracted discussion between the adherents of these two views; but Lincoln, with his strong leaning toward practical results, never formally gave his support to either of them. He regarded the discussion as metaphysical and impractical, and he used to say that at any rate both sides would agree—and this may be regarded as the third theory—that the relation of the seceded States with the Union had been so far disarranged that a readjustment was necessary before they could be recognized as in good standing. This view, while seeming to take a middle course, inclined strongly to the theory that the seceded States were still in the Union.¹

As a cautious approach to the subject, Lincoln issued a proclamation on December 8, 1863, defining in a not very definite way what has been termed the executive mode of reconstruction. He held that, by a combination of disloyal persons in certain States—a kind of conspiracy—a rebellion had been undertaken, and now the time had come in some of those States to restore the government to the hands of the loyal element, which should be encouraged to come for-

¹ Cox says that Thaddeus Stevens hated "bitterly, some of his own party who would not follow his doctrine, and obliterate states in order to territorialize and terrorize them." *Three Decades*, p. 365. The South, following the States' Rights doctrine, held that a seceded State was out of the Union, but when it returned to its allegiance, it came not as a territory but with all its former rights and privileges.

ward and assume the responsibility of self-government.¹ The steps in this restoration were to be, first, the taking of an oath of allegiance to the United States government, as follows: "I, —————, do solemnly swear, in the presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States and the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by congress, or by decision of the supreme court; and that I will, in like manner, abide by and faithfully support all proclamations of the president made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the supreme court. So help me God!" All persons taking this oath voluntarily, except those having been civil or diplomatic officers of the so-called Confederate government, or military officers thereof above the rank of colonel, or those having left seats in the United States Congress or judicial office under the United States, or having resigned commissions in the army or navy of the United States, in order to aid in rebellion, or those having treated colored persons found in the United States service in any capacity, or white persons in charge of same, in any other manner than as prisoners of war,—all persons, with these exceptions, should be regarded as having restored themselves to loyal citizenship. Second, whenever, in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, and North Carolina, a number of persons not less than one tenth in number of the votes cast in each State at the presidential election of 1860, having taken the oath and being qualified voters by law of the State

¹ As we shall see, the government based upon this plan pleased neither the "rebels," who were designated as conspirators, nor the radical Republicans, who thought it was too lenient. It was based on the theory that secession was the act of a number of individual rebels and not of States.

previous to secession, should reestablish a state government which should be republican and in no wise contravening said oath, such should be recognized as the true government of the State, and the United States should guarantee it all constitutional privileges. The president cautiously added that whether members sent to Congress from any State should be admitted rested exclusively, by the Constitution, with Congress and not with the executive. Third, "that, in constructing a loyal state government in any state, the name of the state, the boundary, the subdivisions, the constitution, and the general code of laws, as before the rebellion," should be maintained, "subject only to the modifications made necessary by the conditions hereinbefore stated, and such others, if any, not contravening said conditions, and which may be deemed expedient by those framing the new state government."¹

The last clause allowed considerable latitude to an improvised government representing only one tenth of the voters, and the president brought upon himself much adverse criticism by deciding on so small a proportion of the population as a representative body. According to Lincoln himself, he chose one tenth because the "guarantee of a Republican form of government, which is imposed by the Federal Constitution, implies a feeble minority struggling against a hostile element."² However this may be, it should be said that the president's offer of one tenth showed far more consideration for the South in the midst of the war than did the policy substituted by Congress after the close of the war. It did not exclude the great mass of Confederate soldiers who owned the property of the South and who might wish at some time to return to their Federal allegiance, nor did it give the franchise to the emancipated slave.

¹ Proclamation of Amnesty, Dec. 8, 1863, Macdonald, Select Statutes, No. 35.

² "The delays caused by the inroads of the Confederate forces in the parishes around the city induced the President to consent to a reorganization of the state on a basis of less population than he had prescribed in his amnesty proclamation." Cox, *Three Decades*, p. 426. I think a further explanation is that Lincoln could not hope to obtain more than one tenth.

In the meantime, the Free State party had been pushing its registration, and was planning to obtain permission of Governor Shepley to hold an election on January 25, 1864, at which delegates should be chosen to a state convention which should frame an absolutely new constitution for the State of Louisiana. They had not, however, counted upon the strong fondness of General Banks for politics. To their astonishment, by his proclamation of January 8, Banks took matters into his own hands, and leaving both the existing parties in the lurch, announced his own plan for reconstructing Louisiana. He afterwards justified his action by declaring that in December the president had written to him of his dissatisfaction at the slow development of loyal sentiment in Louisiana, only two thousand having registered as voters. "I replied" said Banks, "that if he desired . . . a government organized, it could be done, and if he gave me directions I would do it immediately. I received a letter from him authorizing me to take such measures as I thought necessary to organize a loyal free State government by the people of the State."¹

Banks now adopted from the president's proclamation the oath of allegiance prescribed as a qualification of voters, and instead of upholding the contention of the radicals or Free State party that nothing should be done toward establishing self-government until a new constitution was framed, he declared that an election should be held on February 22, 1864 (in honor of Washington), for the election of a governor, lieutenant-governor, secretary of state, treasurer, attorney-general, superintendent of education, and auditor. These officers, he declared, without a legislature and without a judiciary,² should constitute for the present the civil government of the State, and should be installed March 4. As a sop to the radicals, Banks further declared that an election of delegates to revise the constitution of 1852

¹ Louisiana Election Case, 38th Cong., 2d sess., H. Rept. No. 13, p. 17.

² As we shall see, Lincoln had established a provisional court with extraordinary powers.

should be held on the first Monday in April. In accordance with the suggestion of the president, he declared that the constitution of 1852 and the laws of the State should be revived and should remain in force; but he went further on his own responsibility in declaring that all laws upholding slavery even within the Federal lines were null and void. He added, however, that this proceeding was not intended to ignore the rights existing prior to the rebellion or to preclude the claim for compensation of loyal citizens for losses sustained by enlistments or other authorized acts of the government.¹ His proclamation concluded with the following burst of eloquence: "Louisiana, in the opening of her history, sealed the integrity of the Union by conferring upon its Government the Valley of the Mississippi.² In the war for independence upon the sea, she crowned a glorious struggle against the first maritime power of the world, by a victory unsurpassed in the annals of war. Let her people now announce to the world the coming restoration of the Union, in which the ages that follow us have a deeper interest than our own, by the organization of a free Government, and her fame will be immortal!"³

The conservatives were displeased by this bold step in regard to slavery, while the radicals, who had been expecting to work out the regeneration of Louisiana and choose from their number such officials as might be needed in the civil government of the State, were scandalized by the action of the commanding general. When they recovered from their surprise, they laid before Banks a protest in which they called his attention to the fact that he had annulled slavery⁴ when the president's policy had left it untouched

¹ Era, January 31, 1864.

² The historical fact, however, is that the annexation of Louisiana brought forth the strongest threats of secession from the New England States.

³ Annual Cyclopaedia, 1863, subject "Louisiana," p. 593.

⁴ The St. Louis Democrat was quoted at the time as saying: "Banks has gone further than Fremont or Hunter in making war on the institution. The President reversed the action of Fremont and Hunter. What will he do with Banks?" As a fact, the president did nothing. He had advanced beyond the period of Fremont and Hunter. The whirligig of time was bringing in rapid changes.

within the Federal lines; that he had proclaimed to be in force a constitution which they held to be null and void; and that all this was an assertion of martial law dangerous to the liberties of the people, and was contrary to the proclamation of the president declaring that the state government must be established by one tenth of the voters of 1860.¹ Notwithstanding this able protest, Banks, strong with the authority of the president, proceeded to carry out his plans; and the two political factions of New Orleans, recognizing the inevitable, decided to take part in the election and to try to elect their respective candidates.

The administration candidate for governor, Michael Hahn, was born in Bavaria, but had lived in Louisiana for many years. He enjoyed the unbounded confidence of Banks, and received from him constant expressions of admiration.² It was believed from the beginning of the campaign that Hahn would be nominated by the Free State party. It was claimed for him that his qualifications were irresistible: he was the candidate of General Banks; he was going to run, nomination or no nomination; his principles were not fixed—he was neither slavery nor antislavery; if nominated on a Free State platform, it was believed that he would be true to it, but if not he would run on a “copperhead platform” and defeat the regular nominee.³

On February 1 the nominating convention met at Lyceum Hall, in New Orleans; but according to the newspapers of the following day pandemonium reigned supreme, and the “convention” adjourned to the rooms of the Free State committee, where B. F. Flanders and J. Madison Wells⁴ were nominated for the offices of governor and lieutenant-

¹ Annual Cyclopaedia, 1863, subject “Louisiana,” p. 593.

² Hahn (1830–1886) was graduated from the law department of the University of Louisiana in 1854. He was a Douglas man in 1860, and held the office of notary under the Confederacy, a fact said to have been winked at by the judge, T. W. Collens. In 1864 he edited the *Delta*, which supported Banks.

³ *Times*, February 1, 1864.

⁴ Wells was a repentant slaveholder who had been compelled to leave his home in western Louisiana by the secessionists.

governor. A part of the convention, however, called the "Rump" by some, continued in session at the Lyceum, and nominated Michael Hahn for governor and J. Madison Wells for lieutenant-governor. Thus Wells was given second place on both tickets. This would seem to indicate that the split was the result of a mere factional fight for office and that the differences were a matter of little moment.¹ Hahn's "Rump" adopted resolutions condemning slavery; and Hahn himself declared in the convention that he was a Union man, and that, if he could help it, there would be no slavery in Louisiana. This was also the platform of the adjourned convention; but if one reads between the lines, the real issue seems to have been what should be the treatment of the negro after he was emancipated. The Union, a newspaper said to be the organ of the colored population, supported Flanders, and this faction was openly accused of favoring negro equality. Moreover, at one of the Hahn meetings, Lombard of Plaquemines declared that he had been a friend of Flanders until a colored delegation was admitted to seats in the Lyceum on December 15, 1863, an admission for which Flanders had voted. In answer to such speeches the Flanders faction said that they had been opposed on the alleged ground that they favored "negro equality" when, in fact, they had never said anything about "negro equality." A few days before the election Flanders declared in a public speech that while he was in favor of abolishing slavery at once, he had never advocated negro suffrage and did not deem it practicable.²

Unless these utterances were the result of a secret understanding with the colored population, they must have borne dismay to their hearts. Already in the preceding November the free men of color had held a meeting and drawn up a strong appeal to Governor Shepley asking to be allowed to

¹ Denison says, "The only distinction I feel able to make is that one is a Banks and the other an anti-Banks party." Chase Correspondence, p. 430. Judge Seymour said that the Flanders party was in the majority, and so bolted.

² Times, February 14, 1864.

register and vote. They reviewed their services under Jackson, who called them "my fellow-citizens" just after the battle of New Orleans, and they declared their present loyalty to the Union. For "forty-nine years," the petition ran, "they have never ceased to be peaceable citizens, paying their taxes on assessments of more than nine millions of dollars."¹ But however strongly this petition appealed to Shepley, it was manifestly impossible to grant it at this time. The interests of the several parties were sufficiently conflicting without introducing the disturbing element of negro suffrage. Moreover, if the free men of color were to vote, could the suffrage be refused to the slaves who had been practically emancipated by the advance of the Federal army? As far as is known, Shepley returned no answer to the appeal; for in the following January the so-called Union Radical Association (colored) sent a committee to call on Shepley requesting him to recognize the "rights" of the free colored population to the franchise. Shepley, unwilling and unable to assume such responsibility, referred the committee to General Banks, but the latter gave them no definite reply. Accordingly, the committee sent P. M. Tourné to Washington to advocate their claims before the president and his cabinet.² What the result was is not known, though this appeal may have influenced Lincoln in a letter he wrote to Governor Hahn suggesting the extension of the suffrage to the more intelligent of the negroes. At this time he seems to have contented himself with sending to New Orleans a certain McKay, who was instructed to inquire into the condition of the colored people.³

As the election of February 22 drew near, the success of the administration candidate seemed assured. The Flanders faction, becoming frightened, made an appeal to the Hahn faction to unite; but the latter now felt themselves strong

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 591. The free men of color had either never been slaves or had been free for several generations.

² Times, January 20, 1864.

Times, February 9, 1864.

enough not to recognize their opponents, and they tartly answered that Hahn would not retire in favor of harmony (for thus they pretended to understand the advances of their opponents). They must have been provoked, moreover, by a communication entitled "Exceptions from Amnesty," appearing in the *Times* of January 7 and evidently inspired by the Flanders faction. It criticised Lincoln's policy adversely, declaring that the exceptions to general amnesty would not cover over twelve hundred, that is, not more than a thousandth part of those participating in the great "crime." "A large guilty class is omitted. What say you, faithful and suffering loyalist of Louisiana, of seeing Thos. O. Moore put upon the same footing with the unwilling conscript whom his tyranny has forced to fight against the Union? And so of Moise, Manning & Co., the regency who really engineered the treason and ruin of Louisiana." Because of this opposition to the president and for other reasons the Flanders faction lost popularity, and did not even poll so large a vote as did J. Q. A. Fellows, nominated by the Conservative Union party to take the place of the distinguished lawyer, Christian Roselius, who had refused the position. The platform of this faction was "compensation to loyal men for slave property lost by war." As such compensation was included in Banks's proclamation, this faction superficially did not differ from the Hahn faction, though popularly believed to be wedded to the old order of things in the matter of slavery. The *Times* represented them as "bemoaning" that institution, and Roselius, in a speech of February 4, advocated leaving "the slavery question to be decided by each State." They spoke of themselves as "inhabiting the temperate zone of politics." Some of them had even balked at Lincoln's oath of allegiance. Roselius asked to be relieved from taking an oath "to support all acts passed by Congress," and declared that the necessity of taking such an oath would cut down the vote in Louisiana.¹

¹ Denison thought that Fellows would probably have been elected if Banks had not demanded the proclamation oath. Chase Correspondence, p. 431.

But Banks was unrelenting on this point. He even declared that there should be no stay-at-home-vote, speaking in no uncertain terms on this subject in his proclamation of February 3, 1864. "Men," he said, "who refuse to defend their country with the ballot box or cartridge box have no just claim to the benefits of liberty regulated by law. All people not exempt by the law of nations . . . are called upon to take the oath of allegiance." "Indifference will be treated as a crime, and faction as treason." Briefly speaking, his order was "Vote, fight or leave!"¹ This raised the indignation of many who proposed to remain neutral in the controversy, and who now loudly proclaimed that "to say *when* men shall vote is as much tyranny as to say *how* they shall vote." But Banks had unwittingly adopted the provisions of Solon's famous sedition law which declared that he who refused to take sides in the political controversies of the state should be deprived of his citizenship, that is, the protection of the government and participation in its offices. In this course, Banks was warmly supported by the New York Tribune,² but he found it necessary later to defend his action against the majority in Congress by denying that he had enforced his own regulations or had said, "You must vote or leave." Probably the principal reason for his insistence was that it was necessary for at least one tenth of the number of voters of 1860 to participate in order to make the election valid in the eyes of Lincoln, but whether that be true or not it is difficult to see why Banks should be blamed for his procedure. He certainly did not compel any one to vote for any special candidate.³

¹ Times, February 5, 1864.

² Times, March 3, 1864.

³ The three tickets were:—

Ticket:	Administration:	Flanders:	Conservatives:
Governor	Michael Hahn	B. F. Flanders	J. Q. A. Fellows
Lieut. Gov.	J. M. Wells	J. M. Wells	J. M. Pelton
Sec. of State	A. Wrotnowski	Jona C. White	George S. Lacey
Treasurer	J. G. Belden	Dr. A. Shelly	John Gauche
Atty. Gen'l.	B. F. Lynch	Chas. W. Hornor	J. Ad. Rozier
Auditor	A. P. Dostie	Wm. M. Abbott	Julian Neville
Supt. of Ed'cn.	Jno. McNair	B. L. Brown	Denis Cronan, Jr.

The members of the first ticket, with the exception of Wells, were natives either of foreign countries or of the Northern States.

Nor did Banks attempt to include colored voters. He had abolished slavery within the Federal lines as far as lay within his power, but the constitution of 1852, the validity of which in other respects he claimed to acknowledge, did not authorize negro suffrage, and he did not think it expedient to ignore that constitution on this point. Accordingly, he declared the electors to be "every free white male, twenty-one years of age, who has been resident in the State twelve months, and in the parish six months, who shall be a citizen of the United States, and shall have taken the oath prescribed by the President in December, 1863." It is said that 10,000 citizens took the oath and registered previous to the election. The total vote on February 22 was 11,355, of which Hahn received 6171, Fellows, 2959, and Flanders, 2225, giving a majority to Hahn. Election returns came in from Orleans, Baton Rouge, Algiers, Lockport, Port Hudson, Carrollton, Donaldsonville, Franklin, Fort McComb, Fort Jackson, Buras, and even Barancas, Florida. Wherever it was possible Louisiana soldiers in the Federal army voted, but only to the number of 808 in all.¹ The conservatives declared that the existing suffrage laws had been violated and that consequently the election of Hahn was no election at all, while "A Free State Man" published in the Times a letter asserting that if the officers elected presumed to exercise the functions of their offices, they would be deemed by the mass of people in Louisiana to be usurpers and intruders. Little attention, however, was paid to these disgruntled losers. More than one tenth of the voting population of 1860² had voted, and this was all that Banks wished. His enemies kept asking where was his legislature, and whether the few officers he had elected constituted a state government. But the commanding general believed that he had made a good beginning, and that as yet it was

¹ Banks's letter to Senator Lane. Published as a pamphlet entitled "The Reconstruction of States." New York, 1865. There is a copy in the Howard Library, New Orleans.

² The vote of Louisiana in the presidential election of 1860 was 49,510. Blaine says it was 50,510. Twenty Years, II, 40.

premature to elect a legislature which could represent only a small portion of the State. Was he not already anticipating the conquest of the whole State in his campaign of March and April, 1864,¹ and the full restoration of Louisiana to the Union? And if his military talents had equalled his political talents, he might well have succeeded in his plans.

On the 4th of March Governor Hahn was inaugurated with imposing ceremonies. There were addresses by the new governor and by General Banks. "Thirty thousand voices (!) joined in singing America."² Around the walls of the hall, which were draped with flags, were such inscriptions as "Farragut, the bravest of the brave," "Major-General N. P. Banks, the hero of Port Gibson and of Freedom in Louisiana." At a great ball which followed at the Opera House a shield was placed between the proscenium boxes bearing the inscription, "Louisiana, first of the erring sisters, keeps step to the music of the Union." About ten days later President Lincoln invested Hahn with the powers hitherto exercised by General Shepley, the military governor of Louisiana, thus adding to his authority as civil governor while indicating his subordination to the Federal government.

In a personal note to the new governor the president said: "I congratulate you on having fixed your name in history as the first Free-State Governor of Louisiana. . . . Now you are about to have a convention which among other things will probably define the elective franchise. I barely suggest for your private consideration whether some of the colored people may not be let in, as for instance the very intelligent and especially those who have fought gallantly in our ranks. They would probably help in some trying time in the future to keep the jewel of Liberty in the family of Freedom."³ Two years later Hahn was prepared to advocate the same policy; but at this time he seems to have regarded it as unwise, for the Era of February 15 had contained an "Ap-

¹ See page 32.

² Times, March 5, 1864.

³ Blaine, Twenty Years, II, 39.

peal to Conservatives" in which it was stated that Hahn was opposed to negro suffrage while Flanders was in favor of it. This letter of Lincoln, says Blaine, was "of deep and almost prophetic significance. It was probably the earliest proposition from any authentic source to endow the negro with the right of suffrage."¹ We may recognize now that had Lincoln's advice been followed the South would doubtless have been spared the horrors of congressional reconstruction; but it was asking too much of Louisiana, or of any other Southern State at this time, to expect her to open the door to negro suffrage when that door was firmly closed in many of the Northern States.² We shall see that the new constitution shortly to be framed in Louisiana did not confer the ballot on the negroes, but did go so far as to authorize the new legislature to extend the right of suffrage to citizens of the United States (without distinction of color) in consideration of military service, payment of taxes, and intellectual fitness. But this shifting of the responsibility was not a success. The gracious permission was ignored by the legislature, and only after a period of bitter dissension and even bloodshed was the suffrage extended to the negro.

It may be added that General Banks would have been glad to leave the door ajar for negro suffrage but he believed the difficulties too great at that time to be overcome. "As the negroes were in the majority" (within the Federal

¹ *Twenty Years*, II, 40.

² Lincoln himself had held a different view in 1858, for in September of that year he spoke as follows at Charleston, Illinois:—

"I will say, then, that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races; that I am not, nor ever have been, in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say, in addition to this, that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white man." *Writings of Lincoln* (Lapsley), IV, 2.

lines¹), he afterwards explained, "I thought it unwise to give them the suffrage, as it would have created a negro constituency. The whites might give suffrage to the negroes, but if the negroes gave suffrage to the whites, it would result in the negroes losing it." "My idea was to get a decision from Judge Durell declaring a man with a major part of white blood should possess all the rights of a white man;² but I had a great deal to do, and a few men who wanted to break the bundle of sticks without loosening the band defeated it."

While these political matters were agitating that portion of Louisiana which was within the Federal lines, the Confederates kept up more than a semblance of government at Shreveport. Here the legislature met, and here the Confederate governor issued his proclamations to all who were loyal to the cause of secession. On November 21, 1863, an election was held, and without opposition Brigadier-General Henry W. Allen³ was elected governor, with B. W. Pearce as lieutenant-governor, P. D. Hardy, secretary of state, F. S. Goode, attorney-general, H. Peralta, auditor, and B. L. Defreese, treasurer. The vote for members of the Confederate Congress was taken by general ticket, and seems to have resulted in the reelection of the former representatives, C. J. Villere, C. M. Conrad, D. F. Kenner, L. J. Dufour, Henry Marshall, and John Perkins, Jr.⁴ The legislature, which also met at Shreveport, passed a number of acts, among the most important of which were these: (1) Every citizen (negroes were not citizens) should vote who had not forfeited his citizenship by electing to adhere to the govern-

¹ While the white population of 1860 was more numerous by 7256 than the black, the number of adult negroes was greater than the number of adult whites. The whites over twenty were 101,499, and the colored were 101,814. McPherson, *Political Manual*, 1866, p. 125. Senator Jonas says this was due to the fact that the Louisiana planters bought slaves from Virginia, and naturally preferred to buy adults rather than children.

² It was claimed that such a decision would have given the suffrage to 30,000 colored persons.

³ Allen was a much beloved and gallant Confederate soldier.

⁴ *Times*, January 7, 1864.

ment of the United States. (2) Five hundred thousand dollars were voted to pay for slaves lost by death or otherwise, while impressed on the public works of the State. (3) Any slave bearing arms against the inhabitants of the State or the Confederate States, or who should be engaged in any revolt or rebellion or insurrection, should suffer death.¹ Hence, in 1864, there were two capitals in Louisiana, and two governors, each claiming legitimacy. If a majority can determine such a question, the government at Shreveport could claim to be not only *de facto* but *de jure*.

¹ In this connection it may be added that in the latter part of 1864 Governor Allen favored the arming of the negroes in behalf of the Confederacy. In September he wrote to J. A. Seddon, secretary of war in the Confederate government: "The time has come to put into the Army every able-bodied negro as a soldier. The negro knows he cannot escape conscription if he goes to the enemy. He must play an important part in the war. He caused the fight, and he will have his portion of the burden to bear. . . . I would free all able to bear arms, and put them in the field at once." To offset this threat and free the slaves from any fear of conscription in case they chose to run away from their masters, Major-General E. R. S. Canby, then in command of the Department of the Gulf, issued a proclamation in October, saying: "The class of persons referred to [in Allen's letter] will not be conscripted into the armies of the United States. If they come within our lines, they will be freed and treated as refugees. They will be accepted as volunteers or will be employed in the public service and their families will be cared for until they are in a condition to care for them. If a draft should become necessary, no discrimination will be made against them." *Times*, October 13, 1864. Fortunately, the authorities of the Confederacy concluded not to support its waning fortunes by the emancipation and arming of the slaves. The ultimate result of the conflict would have been the same, and such a measure would only have embittered the war and prolonged it for a very brief period, if at all.

CHAPTER IV.

THE CONVENTION OF 1864.

In the meantime, on March 11, 1864, General Banks had issued a proclamation fixing an election to be held on March 28 for the choice of delegates to a convention which should revise and amend the constitution of 1852. It was confirmed a few days later by Governor Hahn, probably with the intention of softening its military character by bringing it under the authority of the state executive. The proclamation named the forty-eight parishes of the State, gave the white population of each in 1860 (aggregating 357,629), and assigned to each parish one delegate apparently for each 2000 of the white inhabitants. The colored population, which Banks at this time believed to be in the majority, was neither to vote nor to be represented. Banks afterwards explained¹ that while this white basis was a departure from the constitution of 1852, it was adopted to prevent the slaveholding planters from keeping the control they had exercised in the past and to give New Orleans the power she really possessed.² If the freedmen were not to vote, they should not be permitted to influence representation. As many of the parishes named were not within the Federal lines, it was provided that such parishes should be entitled to elect delegates at any time before the dissolution of the convention. The qualifications of electors were the same as in the February election. The vote must have been a great disappointment to General Banks. By strenuous exertions in the February election he had succeeded in polling a vote of more than 10,000, which was twice the required tenth of Lincoln's proclamation; but in the last election he

¹ Louisiana Election Case, 38th Cong., 2d sess., H. Rept. No. 13, p. 19.

² The constitution of 1852 based representation on total population.

was absent from the city, and his opponents (conservatives and radicals) seem to have decided that the best way to hamper his policy was to stay away from the polls. In any case the result was that the total vote amounted to only about 6400.¹

In Liberty Hall,² which had been dedicated with solemn ceremony to "religion and liberty," the delegates met on April 6, 1864, and sat for seventy-eight days. On April 8, as we have seen, Banks's army was defeated at Mansfield in western Louisiana; and though the battle at Pleasant Hill on the following day was drawn, the general thought it wise to retire from the "Trans-Mississippi Department." As western Louisiana was thus left in the hands of the Confederates, the convention, in order to insure as far as possible the validity of its actions, adopted seventy-six as its quorum, which number, it was held, would have been a quorum had every parish been represented (seventy-six out of a possible one hundred and fifty). The total number of parishes represented was only nineteen, leaving the residue of the State, or twenty-nine parishes, unrepresented. The parishes represented were Orleans, Assumption, Avoyelles, East Baton Rouge, West Baton Rouge, Concordia, East Feliciana, Jefferson, Lafourche, Madison, Rapides, St. Bernard, St. James, St. John the Baptist, St. Mary, Terrebonne, Ascension, and, later, Plaquemines and Iberville. From these parishes the largest number of delegates ever on the roll of the convention was ninety-eight.³ Of course all the delegates were antisecessionists, but there was a scattering of conservatives in the assembly who hoped to secure compensation for the emancipated slaves. J. A. Rozier (conservative), who "inhabited the temperate zone

¹ A member of the convention gives the total vote as 6355, of which 3832 were in New Orleans. *Debates in Convention, 1864*, p. 408. Banks afterwards claimed that New Orleans was really the State of Louisiana, but the minority report of the congressional committee showed that the city in 1860 did not have one half the population of the State.

² This was the top story of the present City Hall.

³ Of these, New Orleans had 63, leaving the country parishes only 35. *Debates in Convention, 1864*, pp. 4, 370.

of politics," had refused to be a candidate on the ground that Banks had committed too many irregularities at the last election. The most prominent members were not natives of Louisiana, but many of them had long lived in the State. They were said to be Banks's party.¹ It was in no sense a representative body. In fact, one of the members declared that many of the delegates were not able to return to their respective homes on account of the extension of Confederate jurisdiction in the State.

Hardly had the convention assembled and elected Judge Durell as its presiding officer before the question was raised as to the political complexion of the members present. One of the members alleged that he had heard it stated that one half of the members were "copperheads,"² and he moved that all members be required to produce evidence that they had taken the iron-clad oath prescribed by Lincoln in December, 1863, or that they now take the oath before the president of the convention. This motion, though finally carried, met with some opposition for various reasons: it was alleged that it reflected on the convention and was unnecessary, and eleven members out of seventy-seven voted against it. It was especially opposed by the most distinguished member, Christian Roselius, the Nestor of the Louisiana bar. He declared that he had been a member of three previous conventions in Louisiana, and that no such oath had been required of him.³ The majority, however, being now against him, he withdrew.

¹ Denison, who was connected with the custom house, and supported Chase for president, wrote on April 1, 1864, that "the character, ability and standing of the Delegates, is not such as could be wished. There are a few excellent men elected, like Judge Durell, Judge Howell, Dr. Bonzano and Mr. Brott. . . . This time I worked to the best of my ability with Mr. Flanders and his friends." Chase Correspondence, p. 435. He later writes, "What fools they [the members of the convention] are making of themselves—is a very common remark even among those who helped to elect them." *Ibid.*, p. 439.

² "Copperheads" were southern sympathizers living in the North.

³ Roselius had voted against secession in the convention of 1861, but he signed the constitution of 1861. Originally a redemptioner from Germany, he had risen to great prominence in Louisiana.

That the convention was not wholly in sympathy with the president is shown by the fact that when a motion to endorse his nomination for a second term was made, it was carried by a vote of 60 to 20, the minority doubtless representing those who inclined to the choice of General McClellan, the Democratic candidate. Still, all the members were bitterly opposed to secession, and sincerely believed they would be hanged with great promptness if the "Rebels" regained possession of New Orleans. The only points on which the members did not show harmony and homogeneity were three: (1) compensation of loyal slaveholders; (2) the education of freedmen at the expense of the whites and blacks together; (3) the granting of the suffrage to certain classes of negroes.

As we have seen, Banks had suspended all laws concerning slavery. A large majority of the convention were in favor of immediate emancipation by constitutional enactment. When the provision came up on its third reading, that "slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted," should be forever abolished and prohibited throughout the State, and the legislature should make no law recognizing the right of property in man, it was adopted by a vote of 72 to 13. Of those voting against emancipation one member moved as a substitute that all legislation hereafter to be had on the subject of slavery should look to the amelioration of the condition of the slaves with a view to their final emancipation on the first of January, 1900, as offered by the government of the United States through the president. The rest of the minority, however, seem to have voted "nay" on the ground that the convention should pass some provisos touching the questions of compensation and the suffrage, and they wished to hold up the question of emancipation until these important matters were settled.

As to compensation, the great majority of the members were in favor of first emancipating and then seeking compensation for loyal owners, which last, some one suggested,

might best be accomplished by taxing the property of rebels. For, argued one member, the slaveholders outside the Federal lines, in spite of the president's proclamation, still owned their slaves and were getting rich from them, while slaves within the lines had been set free. Hence, if the loyal owners were not compensated, they would suffer injustice. Wishing to pacify as far as possible the members demanding compensation, the convention finally adopted a report recommending an appeal to Congress on the following grounds: (1) that the loyalists would be impoverished by emancipation; (2) that Great Britain, in 1832, in abolishing slavery, gave £20,000,000 for the compensation of slaveholders,¹ and that the United States government had likewise given compensation in the District of Columbia. Moreover, Louisiana was still more deserving because she had abolished slavery voluntarily. To carry out this resolution, a committee was appointed to correspond with members of Congress, but though the appeal, to the unprejudiced mind, seems to have been a just one, no favorable answer was ever received from the Federal government. Loyal and disloyal slaveholders were to be treated alike in the matter of compensation.

As to the suffrage, there seems to have been, in the early stage of the work of the convention, a strong sentiment against granting it to the negro. In fact, on May 10 that body adopted a resolution declaring that the legislature should never pass any act authorizing free negroes to vote. But as time passed pressure from without² and a consequent change of policy within induced the convention to throw the burden of responsibility on the legislature that was to meet in the autumn. Accordingly, on June 23 a member named Gorlinski moved that "the Legislature shall have power to pass laws extending the right of suffrage to such persons,

¹It was also urged that Great Britain in her colonies had established an apprenticeship of four years before emancipation; and this compensated the owners for the care of the aged and infirm, who, in Louisiana, must be supported at public expense.

²Denison says that nearly forty votes were changed by the influence of Banks and Hahn. Chase Correspondence, p. 452.

citizens of the United States, as by military service, by taxation to support the government, or by intellectual fitness, may be deemed entitled thereto." When this seemingly innocent resolution¹ was first offered, it was doubtless not clear to many of the members what was its true intention. The word "negro" was not in it, but Sullivan, of Orleans, jumped to his feet to denounce it as a "nigger resolution," and moved to lay it on the table.² In spite of this protest it passed the convention without further discussion by a vote of 48 to 32. Subsequently one of the delegates (Bailey) resigned, giving as his reason the passage of Gorlinski's resolution.

As to the status of the slaves, Banks's proclamation, as we have seen, had declared that all laws upholding slavery were null and void within Federal lines, though the claim for compensation on the part of loyal owners was not ignored. In the convention this act of Banks was regarded by some as abolishing slavery *de jure* and *de facto* wherever it was left untouched by Lincoln's proclamation but by others as merely suspending the laws on this subject.³ But even after the convention had passed the ordinance of emancipation that body was astonished one morning by the news that W. W. Handlin, a judge of the third district court and a bitter opponent of slavery and secession, had virtually decided, by dismissing the suit of a negro woman brought against her master, that slavery still existed in New Orleans. In a lower court, judgment had been given in favor of the woman, and an appeal had been taken to Handlin's court. The defence was that the plaintiff, being a slave, had no rights in the court, that she could neither sue nor be sued. Handlin, sustaining the objection, dismissed the case and overruled the motion for a new trial. This news created great excitement in the convention, and the following resolu-

¹ It was not generally admitted that the negro was a "citizen of the United States."

² *Debates in Convention, 1864*, p. 450.

³ Banks later said his action left slavery existing *de jure* but not *de facto*.

tion was offered: "That all decisions of the courts of the State that declare slavery exists in the State, are contrary to the fundamental laws of the State, and are contempts of the emancipation ordinance passed by this Convention."¹ In the discussion of this resolution the president, Durell, gave it as his opinion that all blacks in New Orleans were free. "Go out into the street," said he, "and order your slave to perform your work: will he obey? Is there any means by which you can make him obey? The military has declared slavery no longer existent in Louisiana, and as all the Courts have been organized by military order, they must obey. There is not a District Judge in the City that doesn't sit as a military Judge." One of the delegates, Mr. Abell, in answer declared that Banks had no power to abolish slavery and the present constitution had not yet been ratified by the people. Finally, however, it was agreed by a vote of 58 to 21 to drop that part of the resolution declaring such decisions of the courts to be "contempts" and to pass the rest.

In the meantime, Governor Hahn had revoked the commission of Judge Handlin,² which caused the resignation of Howell, another judge of the civil courts. It would seem, therefore, that the courts held that slavery still existed in New Orleans, the decision of the commanding general to the contrary notwithstanding; but we hear of no more rulings to that effect. The function of the convention was simply to make permanent what was temporary under

¹ Debates in Convention, 1864, p. 540. The attorney-general of the State, B. F. Lynch, had previously given his opinion that all slaves in Louisiana were free, *de facto* and *de jure*, and hence could testify in court.

² Roselius sarcastically remarked that Handlin had been removed on account of the only correct decision he had ever rendered. Handlin, some years later, brought suit against the State for salary on account of illegal removal. The case reached the United States Supreme Court on appeal. The opinion of the court, given by Justice Chase, was that Hahn had the right as military governor to remove Handlin, a military appointee, "though the reasons assigned for the removal are not approved by the Court." It is not recorded that Handlin derived much satisfaction from the sop thrown to him at the end of the decision. Cf. 12 Wallace, p. 175.

Banks's proclamation. The action of Hahn showed that he regarded the State within Federal lines as strictly under martial law, for no sensible person could maintain that the provision for the emancipation of slaves incorporated in the pending constitution was binding on the courts before that constitution had been ratified by the people; the convention itself had decided that such ratification was necessary.

That the government of Louisiana was military was still further shown by a general order issued on March 22, 1864, before the assembling of the convention. General Banks, on his own responsibility, had made provision for the establishment of schools for freedmen. He appointed a board of education of three persons, and granted it large powers. It was to establish one or more common schools in every school district defined by the provost-marshal; to acquire by purchase or otherwise lands for school sites; to erect school-houses and employ teachers (as far as practicable among the loyal citizens of Louisiana); to furnish books; to provide each adult freedman with a library costing two dollars and fifty cents, this amount to be deducted from the wages of said freedman; and, finally, to levy for these purposes a school tax on real and personal property in every school district.

In the convention this order of Banks was discussed. Mr. Abell moved to declare it unconstitutional on the ground that it had been imposed without the consent of the people, but the convention approved it by a vote of 72 to 9. When, however, the question of providing for the education of the negro came before the convention, that body showed much diversity of opinion as to ways and means, and its final action on the subject was much more liberal toward the negro than the position at first taken, for at an early stage of the proceedings it was decided to establish schools for the whites to be supported by taxation of whites, and for the colored to be supported, in like manner, by taxation of colored persons. If this measure were not adopted, argued Abell, "whites and blacks might be com-

pelled to attend the same schools." This was not a necessary corollary, but, as we shall see, it was what naturally resulted under radical rule. In any case the friends of the freedman feared that he would suffer by separate taxation, and Dr. Dostie wrote a letter to Abell urging that the word "colored" be dropped from the educational and the militia bills. For this or some other reason the mover of the previous resolution, Terry, moved some three weeks later that there should be no separate taxation of the races, and that the legislature should provide for the education of all children between the ages of six and eighteen by the maintenance, by taxation or otherwise, of free public schools. This provision, being adopted by a vote of 53 to 27, was incorporated in the constitution. It was the first constitutional provision for the education of the negro in Louisiana.¹

Some members were bitterly opposed to the very presence of the negro in Louisiana. One speaker urged that all negroes should be "pushed off the soil of America;" another, that they should all be sent to Massachusetts, "where the philanthropists come from." It was answered, however, with some force, that the negroes in the Federal army were at that very moment defending the convention. Negrophilists and negrophobists were both applauded.²

There was, however, much discussion in the convention as to the proper status of persons in whose veins there was only a small admixture of negro blood. It was stated that there were rich planters living on the Mississippi who, in spite of the known fact that they were not entirely white, had yet been recognized as citizens of Louisiana and had always enjoyed full rights as such. An effort was now made to have the convention declare what degree of negro blood should constitute a colored person. Henderson quoted

¹ Previous to the Civil War, when abolition sentiments were active in the North, there was a law in Louisiana forbidding any one to teach a slave to read and write. It is certain, however, that many slaves could read.

² If there were any members in favor of negro equality in any form except by granting the suffrage to certain classes, through legislative enactment, they did not venture to express their views, though the contrary opinion did find voice.

a passage from Edwards's West Indies declaring that in the Spanish and French West Indies there was no degradation of color beyond the quadroons, for beyond these the colored could not be distinguished from the white either by color or feature. It was further stated that, according to the laws of all the slave States except South Carolina and Louisiana, a person was held to be white after the fourth degree.¹ But the convention, not wishing to involve itself in the intricacies of a question which sometimes produced duels and street fights, voted down the resolution by a vote of 47 to 23.² General Banks, as we have seen, was worrying over the same problem, and found the solution equally difficult.

The expenses of the convention proved to be no small item. The first appropriation made by the convention for the per diem of members, for mileage, and for salaries of officers was \$100,000, but as these items amounted to more than \$1000 a day, and there was also a heavy outlay for "contingents," it was found necessary to appropriate \$25,000 additional. The New Orleans Times, which was antagonistic to the work of the convention, though it was at the same time strongly antirebel, published on November 4, 1864, with sarcastic comments, the auditor's account of the contingent expenses of the convention. They included:—

Ice	\$ 414.50
Liquors and cigars	9421.55
Dinner at Galpin's	65.00
Fitting up of Liberty Hall	9150.25
Goblets, wine glasses	791.60
One pen case presented to General Banks	150.00
Daily papers	4237.50
Police duty	1904.00
Stationery	8111.55
Carriage hire, etc.	4304.25
Sundry items	236.35
Bill for printing	7000.00
Amounts for which no vouchers obtainable	608.70

¹ As a fact, however, in Virginia a colored person was one who had one fourth or more of African blood, and in South Carolina the line was drawn at octroons. Stephenson, "Race Distinctions in American Law," *Amer. Law Rev.*, Jan., 1909, p. 39. In Louisiana it was held that "the law does not contemplate that any number of crosses between the negro and the white shall emancipate the offspring of the slave." *Morrison vs. White*, 16 La. Annual, 100.

² Debates in Convention, 1864, pp. 547, 548.

It will be seen that the convention paid without question for liquors and cigars consumed at a free bar the sum of \$9421.55 in seventy-eight days, or \$120 a day—all at the expense of the taxpayers, who were spoken of in the convention as groaning under the burdens of taxation. A thousand dollars was also distributed among the chaplains who had officiated in the convention. The Times headed its account of these heavy expenses for contingents with the appropriate words of Falstaff: "Rob me the exchequer, the first thing thou doest." And it is certain that the free bar established by this convention set an example of extravagance (to use no stronger term) which the later reconstruction legislative assemblies were not slow to follow. The legislature that met in the autumn investigated the disbursements of the convention, and discovered that the sergeant-at-arms had vouched for brandy as costing \$23 per gallon which really cost only \$8. A similar fraud was discovered as to the stationery. The sergeant-at-arms was arrested and presumably punished. As we sum up the expenses of this body it seems a pity that its work, which cost the State so dear, should have found no favor in the eyes of Congress and should finally have been ruthlessly rejected.

On one occasion a strange scene had been witnessed in the convention. On the 22d of July the New Orleans Times, whose editor was Thomas P. May, described the proceedings in the convention of the preceding day as "sickening and disgusting." Members, it said, had declared the president drunk and a d—— fool, and pandemonium had reigned. The debates show that on the day in question there was a great deal of confusion in the convention. Durell, the president, ordered one member under arrest, and amid loud cries of "No adjournment" declared the house adjourned and left the chair. When, however, the article from the Times was brought before the convention, it was denounced by Durell himself as a most infamous libel upon himself and the convention. A resolu-

tion was offered that the sergeant-at-arms should be ordered to take possession of the paper, and that its publication should be suspended until its responsible editor (Thomas P. May) should appear before the convention and purge himself of the libel. When the motion was under discussion, one of the members declared it to be his private opinion that one of the editors of the paper was an adherent of S. P. Chase, ex-secretary of the treasury and a rival of Lincoln in 1860 for the presidency,¹ hence its opposition to the work of the convention. Abell came forward nobly to the defence of Durell by declaring that he knew the statement of the paper as to intoxication to be false. "I walked to an art gallery," he said, "with the president yesterday after adjournment, and if there had been anything unusual in his condition, I should have noticed it." However, Abell was not in favor of prosecuting the paper, as such a course would give it too much distinction. Another speaker said that such articles in the papers arose from the advance of the rebels. "The nearer the rebels come to this city," he said, "the prouder the copperheads become."

On the 23d of July Editor May appeared before the convention under orders of General Banks, and was asked what he had to say. He defied the convention, saying that he appeared in obedience to the orders of General Banks and not in obedience to the resolution of the convention. At the proper time and place, and in pursuance of the forms of law, he would answer any charges against him or his paper. This defiant answer coming instead of an expected apology was regarded as an additional contempt, and a member (Cutler) declared that there was only one thing to do—"Send Thomas P. May to jail! Let him know that he lives in a land of liberty!"² This extraordinary utterance was

¹ This was true of Denison, who owned the largest interest in the paper and controlled its policy. Chase Correspondence, p. 413.

² In the debates are found the words, "but must not abuse that liberty." The writer, however, is assured that Cutler added these words to the report of the proceedings to avoid the conspicuous "bull." One is reminded of the stocks in the old English monastery, which were kept up "pro servanda libertate," *libertas* being used with the peculiar sense of privilege.

received with shouts of applause, and no one of the members seems to have commented on the absurdity. May was condemned to the parish prison for ten days, unless the convention should sooner adjourn. At the same time the military authorities were requested to suppress the newspaper, and the president of the United States was to be requested to remove the offender from the office which he held of assistant treasurer of the United States. General Banks, not seeming clearly to understand why a man should be put in jail to enable him to appreciate the fact that he lived in a land of liberty, or for some other reason, set May free, and the latter boasted in his newspaper of his immunity.

A few days later the convention adopted the constitution by a vote of 67 to 16. This constitution, signed by seventy-nine members, is a brief document, occupying only ten pages of the printed proceedings, and really amounts to nothing more than a revised and amended copy of the constitution of 1852. Its chief features may be summed up as follows: (1) It abolished slavery in Louisiana. (2) It gave suffrage only to male whites of twenty-one years, but it granted the legislature the power to extend the suffrage to such other persons (negroes) as by military service, by taxation to support the government, or by intellectual fitness, should be deemed entitled to it. (3) State senators should be elected for four years and members of the lower house for two. (4) The legislature was authorized to license lotteries and gambling saloons. (5) The capital of the State was located at New Orleans. (6) Education was given to all, white and black, between six and eighteen, with no discrimination in the matter of taxation. (7) The governor should issue a proclamation for the election of a general assembly to meet October 1, 1864. (8) The constitution was to be submitted to popular vote on the first Monday in September. This constitution is of special interest as showing the sentiments of Union men in the South at this early period,¹ and it will

¹ It was afterwards shown by Durant that the constitution was

be noticed that their attitude, particularly with reference to negro suffrage, was marked by great caution.

Just before adjournment it was resolved "That when this Convention adjourns, it shall be at the call of the president, whose duty it shall be to reconvoke the Convention for any cause, or in case the constitution should not be ratified, for the purpose of taking such measures as may be necessary for the formation of a civil government for the State of Louisiana. . . . In case of the ratification of the constitution, it shall be in the power of the Legislature of the State, at its first session, to reconvoke the Convention, in like manner, in case it should be deemed expedient or necessary, for the purpose of making amendments or additions to the Constitution that may, in the opinion of the Legislature, require a reassembling of the Convention."¹ A careful perusal of this resolution will discover the fact that it left indefinite, and hence large, powers in the hands of the president in regard to reconvoking. The whole provision was opposed by Abell, who argued that the convention had done its duty and should adjourn sine die; if the constitution was rejected, he said, the present convention would only misrepresent the people. His view, however, was voted down; and no one was prophet enough to see that the power of reconvoking was fraught with disaster for Louisiana and the whole South—nay, that it was to be the main occasion for the drastic reconstruction legislation which harassed the South for ten years.

The convention adjourned in August, 1864, and at the appointed time the constitution was submitted to the popular vote within the Federal lines, and was adopted by a vote

adopted by the votes of parishes that were not represented in the convention. Denison gives the following letter from Lincoln to Banks: "I have just seen the new Constitution adopted by the Convention of Louisiana and I am anxious that it shall be ratified by the people. I will thank you to let the civil officers in Louisiana, holding under me, know that this is my wish, and to let me know at once who of them openly declares for the Constitution, and who of them, if any, decline to so declare." Chase Correspondence, p. 447.

¹ Debates in Convention, 1864, p. 623.

of 6836 to 1566,¹ which was a larger vote than had been polled for the delegates to the convention, and was well within the limits of the one tenth prescribed by Lincoln. Before the constitution was submitted to the people, however, it had become apparent that Lincoln's plan of reconstruction was to meet with much opposition among the radical adherents of the Republican party, both in Congress and in Louisiana itself. Strong as was Lincoln's place in the affections of his party and of the northern people in general, Congress in 1864 was coming to take a more radical view of the situation, and soon showed itself dissatisfied with the idea of admitting to its floors senators or representatives from what were called satirically the president's "ten per cent. States" and later "the spawn of presidential usurpation." A good occasion for the assumption of this position was offered when two senators from the "reconstructed State of Arkansas," who had been elected in April, 1864, arrived in Washington, and knocked at the doors of the Senate, presenting, so to speak, Lincoln's card as a note of introduction. Congress, led by Charles Sumner, promptly decided that a vote of both houses was necessary to admit representatives from "rebel States."

A bill of July 4, 1864, while the Louisiana convention was still in session, announced the congressional plan of reconstruction. This required (1) that, instead of one tenth, the majority of citizens of the United States in each rebellious State, having sworn allegiance to the Federal government, should elect delegates to a convention for the framing of a new constitution; (2) that Congress had the right to abolish slavery in the said States (as if they were territories); (3) that those who had held office under the Confederacy or who should hold any in the future should not vote; (4) that when a new constitution had been drafted, ratified by a majority of the voters, and approved by Congress, then the president, after obtaining the consent of Congress, should proclaim the new government established as the constitu-

¹ The parish of Orleans gave 5551, and the rest of the State 2951. Voting took place in only twenty parishes.

tional government of the State. Whereupon the reconstructed State might proceed to the election of Federal senators and representatives. Lincoln, it is true, promptly pocket-vetoed this bill, and as Congress adjourned within ten days it failed to become a law.

But some days later Lincoln went further by issuing a proclamation in which he doubted the competency of Congress to abolish slavery in the rebellious States without a constitutional amendment, and practically refused to give up the governments recently established in Arkansas and Louisiana, though he was willing that the other States should adopt the congressional plan. This brought out the famous public protest from Senator Wade of Ohio and Congressman Henry W. Davis of Maryland in which the congressional plan was upheld and Lincoln was warned that "he must confine himself to his executive duties." The reelection of Lincoln in the autumn seemed to leave the victory in his hands; but the difference of opinion between him and Congress as to whether he or that body should take the initiative in reorganizing rebellious States boded no good for the success of the new Louisiana constitution. Just before his death, in the last speech he ever made (April 11, 1865), Lincoln urged in a characteristic manner the acceptance of his view. Referring to the twelve thousand men who had organized the government of Louisiana, he said: "If we reject and spurn them, we do our utmost to disorganize and disperse them. . . . Concede that the new government of Louisiana is only to what it should be as the egg is to the fowl, we shall sooner have the fowl by hatching the egg than by smashing it." But this homely, though happy, simile had little effect upon the majority of Republicans in Congress, and Blaine asserts that certain members even insinuated that the president had a secret understanding with certain rebels who, as soon as the president's hand was withdrawn, would turn the State over to an unrepentant Democracy.¹

In any case the protest of Wade and Davis met with the entire approval of the radical faction in Louisiana. This

¹ Blaine, *Twenty Years*, II, 48.

faction was headed by Thomas J. Durant, who had been accused in the convention—whether justly or not does not appear—with receiving large sums of money from the North to further the election of B. F. Flanders to the governorship. Two years before he had fallen under the disapproval of Lincoln himself,¹ and now he did not enjoy any great popularity among the members of the convention. He had taken part in the election of February, 1864, but his radical candidate having been defeated, he was now determined to overthrow the Lincoln-Banks party. Falling in with the opponents of the president, he published in the *New Orleans Times* of August 18, 1864, a letter which he had written to Henry W. Davis. In this letter he held that the president's appointment of Hahn to take the place of the military governor, Shepley, was illegal; that the president had no right to make such appointments without the consent of the Senate; and that Banks had acted illegally in declaring the constitution of 1852 to be in force. The convention and Governor Hahn, he said, were both opposed to "that principle which in Louisiana can alone establish justice and insure domestic tranquility—equality of all men before the law." By this last phrase Durant doubtless meant that the ballot had not been granted to the freedman; for otherwise there was no inequality before the law. He concluded with the hope that Congress would reject the results of the convention recently adjourned.

Banks, grieved to see the legitimacy of his foster child thus questioned, wrote a defence of his work in Louisiana, which, if not convincing, is at least ingenious.² His avowed object was to show how closely the people of Louisiana had followed the provisions of the reconstruction bill in the reorganization of their government in 1864.³ The conven-

¹ In 1862 Durant had been censured by Lincoln for expressing anxiety for the fate of the Union and not being willing to do anything to save it. Blaine, *Twenty Years*, II, 36.

² Letter to Senator Lane of September 24, 1864. Pamphlet, New York, 1865.

³ In May, 1864, Banks had been supplanted by General R. G. Canby, but he returned later.

tion, he says, was elected in due form. Either the oath of allegiance prescribed by the act of Congress in 1862 or the "iron-clad" oath of the president's proclamation of December 8, 1863, was administered to every voter; in most cases, both. The delegates were chosen by "white male citizens of the United States, twenty-one years of age, who had the qualifications required by law." Soldiers from Louisiana were allowed to vote when in the State. So far as was known, no person who had held office under the Confederate government or who had borne arms against the United States had participated in the elections. The new constitution abolished slavery, prohibited involuntary servitude except for crime, and made all men equal before the law. There was no liability for the rebel debt. It did not deny the elective franchise to men who had borne arms against the United States. "The Convention would have readily adopted this measure, but it was impracticable for Louisiana to overthrow the policy of the general government in this respect. The principal officer of the treasury in New Orleans once held a commission in the rebel army."¹ It had been held that the eleven parishes at the late election had 233,185 inhabitants, and the residue of the State 565,617. But, argues Banks, this is regarding the population of the State as it was in 1860, while of the 331,726 slaves in 1860, nearly one fourth have died or left the State. The mortality of the black population in the commencement of the struggle until furnished with employment and comfortable homes was appalling. The reduction of the white population is nearly equal to the loss among the blacks. Of the 708,000 whites and blacks inhabiting the State in 1860 there are now not more than 451,000² within its borders, two

¹ This was Thomas May, editor of the Times; but May claimed that his service in the Confederacy lasted only four weeks, and that this service was compulsory.

² That Banks largely underestimated the population of the State in 1864 is shown by the fact that the census of 1870 gave Louisiana a population of 726,915, an increase which, supposing Banks's estimate to be correct, cannot be accounted for by natural increase or by the return of the natives.

thirds of which are in the lines of our army. Almost the entire negro population, not only of Louisiana but of the surrounding States, has taken refuge here, together with numerous white families. It is probable that the number qualified to vote by the laws of the State is not over 25,000, and there are from 15,000 to 17,000 voters registered within the lines of the army.¹ Moreover, the constitution just framed had authorized the legislature to extend the suffrage to citizens of the United States without distinction of color in cases of military service, payment of taxes, or intellectual fitness, and the said constitution had been ratified by the people. Hahn had been called the dictator of Louisiana, but he had been designated by the people at a formal, free election as the man they wished for governor, and the president had then designated him as military governor. In view, therefore, of the close compliance which the State had made with the requirements of Congress, Banks² urges that Louisiana be restored to her place in the Union. And it will be noticed that his letter was written six months before the surrender of General Lee.

In October of the same year Durant wrote another letter to his patron, Henry W. Davis, in which he makes a searching analysis of the defence offered by General Banks. This letter³ doubtless furnished the radicals in Congress with the thunder bolts hurled against the president's policy. The president, says this document, pretends to the right, in his military character as commander-in-chief, to organize state

¹ In support of Banks's statement the registrar swore, on November 21, 1864, that there were 13,000 voters in New Orleans alone. He had registered 8000, and 5000 registered before the war had taken the oath.

² In his testimony in 1866 Banks declared that he believed it was proper to reconvoke the convention in 1866 because the constitution of 1864 was merely provisional for the following reasons: "It only represented a portion, about three-fifths, I believe, of the parishes. It could not be regarded as complete until formally accepted by all the parishes, and until recognized by the government of the United States." Report of the Select Committee on New Orleans Riots, 39th Cong., 2d sess., H. Rept. No. 16, testimony, p. 516.

³ Published as a pamphlet, New Orleans, 1864. Copy in the Howard Library, New Orleans.

governments designed to survive the war and, in the meantime, to possess the right to participate in the government by sending senators and representatives to Congress and to cast votes in a presidential election, a right which both the Constitution and the courts have declared belongs to Congress. General Banks had adopted in the fullest extent the presidential idea: "No declaration of war without the consent of Congress, but once waged by its order, The President, as commander-in-chief, cannot be restricted in his action." This Durant conceives to be an error. As to what was actually done in Louisiana, there was no real compliance either with the act of Congress or with the existing laws of the State. Military resistance had not ceased in one half the State; and the whole political movement, while pretending to be civil, was purely military throughout. Banks ordered everything, dominated everything. He pretended to follow the law of the State, except as to slavery; but he had based representation in the convention on white population when the existing constitution required it to be based on the total population. He had given sixty-three delegates to New Orleans, though that city was entitled to only twenty-six. The new constitution had been adopted in convention by a vote of 66 to 16, which was ten less than the quorum fixed. Moreover, when submitted to the people, it had been ratified in some parishes which had no representatives in the convention. General Banks had estimated the population to be for the most part within Federal lines, but his estimates were only guesswork. Whatever the number of voters registered, the smallness of the vote cast showed that Banks's action was not supported by the majority of the loyal vote of the State. Finally, Banks claimed that "equality before the law" had been granted to all citizens, but neither the "right" to vote nor to hold office had been granted the negro. If Banks had called only negroes into his convention, would this have been regarded as granting "equal rights" to the whites?

This letter was a powerful arraignment of Banks's work

in Louisiana ; and, as we have seen, it fell in with the humor of the majority in Congress. Even the final argument that the "right" to hold office and to vote had been denied the negro was soon to gain force among the radicals ; for, though States of the North and West denied these rights to the colored citizens, there was a growing feeling that the rebel States should be compelled to grant them. Moreover, the returning Confederates in 1865 rejected the convention's work as based on fraud and corruption. Only a small faction supported it.

CHAPTER V.

GOVERNMENT DURING THE WAR.

As provided in the new constitution, the state government was completed on September 5 by the election of a general assembly. It was alleged that the vote cast at this election was 9830; but the enemies of the legislature maintained that the registration had not been conducted in accordance with the constitution, or was otherwise illegal, and that over 5000 votes "bore no traces of legality." It was also maintained that many colored persons had been registered. The new legislature met October 3. It seems to have represented the State about as fully as the constitutional convention had done. At the opening session there were twenty-three senators and sixty or more representatives.¹ Some of these had been members of the convention, and the same sentiments toward political issues prevailed as in that body. No acts of any great importance were passed by this legislature. It was more noteworthy for what it failed to do than for what it did. Its negative attitude is perhaps excusable when we remember that its status was dubious; it was surrounded by hostile factions denying its legality, and it was by no means sure of its recognition in the halls of Congress.

The general belief is that this legislature refused by a large majority to grant the suffrage to the negro,² but an examination of the proceedings shows that no vote was ever taken on this subject. Governor Hahn in his message did not suggest that the legislature should avail itself of the constitutional provision; and when he resigned the office of governor in February, 1865, to accept the office of United States senator, he declared that "universal suffrage will be

¹ Twenty-five parishes claimed representation. *Journal of the House of Representatives*, 1864, p. 4.

² *Annual Cyclopaedia*, 1864, subject "Louisiana," p. 479.

granted whenever it is deemed wise and timely.¹ Louisiana has already done more than three fourths of the Northern States." His attitude doubtless determined the action of the general assembly. In the proceedings of the lower house there are very few references to the negro question. Marie introduced a bill to repeal article 95 of the civil code and to permit marriages between blacks and whites. It was voted down, 58 to 4. Later, a member gave notice that he would introduce a bill to submit the question of negro suffrage to the people of the State, but no further reference to this impracticable scheme is to be found. In the senate a bill declaring white every person having not more than one fourth negro blood was laid on the table by a vote of 20 to 4. The reasons assigned for this action were various. It was declared that a prominent journal had opposed such a bill on the ground that it was an unjust, incomplete, and partial method of treating the suffrage, which should be based on military service, intellectual fitness, or property qualification. A full-blooded negro, for example, had fought with bravery in the Union army at Port Gibson. Others said that the motion was premature. Later in the session a petition was introduced from five thousand negroes, "many, if not the majority" of whom were in the Federal army, asking for the suffrage, but no action was taken. One member, apparently expressing the general sentiment, said: "It will be time enough to grant this petition when all the other free States grant it and set us the example. When this State grants it, I shall go to China."²

Nor was the attitude of the senate toward the rebels marked by any decisive action. A bill was introduced to pardon Confederates under the grade of colonel who should take the oath of allegiance to Louisiana and the United States, but to institute proceedings against Thomas J. Semmes, E. W. Moise, J. P. Benjamin, John Slidell, Henry M. Hyams, and others, for treason and perjury, their prop-

¹ In the summer of 1865 he advocated negro suffrage vigorously.

² Debates of the Senate, 1864, p. 65.

erty to be seized and sold for the benefit of loyalists and refugees. This attractive program was voted down by the narrow margin of 3 in a vote of 21.

On two questions this legislature did reach an agreement. The thirteenth amendment to the Federal Constitution abolishing slavery in the United States was unanimously adopted in both houses,¹ and subsequently (December 18, 1865) Louisiana was mentioned as one of the States ratifying the same. The legislature also elected two United States senators. They were R. King Cutler² to fill the unexpired term of the "rebel," John Slidell,³ and Charles Smith for the unexpired term of J. P. Benjamin. As Smith's term would expire March 4, 1865, the same legislature in February of that year elected Governor Hahn to succeed him.

When Cutler and Smith applied for admission to the United States Senate, their claims were considered by the Judiciary Committee, which reported, on February 18, 1865, that the government of Louisiana had been inaugurated in a manner that was not free from objection, but that it was as good a government as could be expected and fairly repre-

¹ It was readopted by the Democratic legislature of 1865-1866, which was fully representative of the State.

² Later, the legislature elected Henry Boyce, and began his term on March 4, 1861, the end of Slidell's. Hence Cutler was illegally elected. Slidell's term had really expired in 1861. Denison writes that Cutler is "an unprincipled demagogue. . . . In secession times he organized and was Captain of a Confederate Company called the King Cutler Guards. . . . Gov. Hahn intended that Judge Durell and another person (Bullitt) should be elected Senators, but the Legislature took the bit in their teeth, and refusing to mind the reins, elected Cutler and Smith." Chase Correspondence, p. 453.

³ The Times, unfavorable to both Cutler and Slidell, published, on November 7, satirical epigrams at their expense:—

"A dealer sly was old John Slidell;
Shuffle the cards—make the sly deal tell;
John's highest aim is his pocket's weal,
And in dealing slyly, he beats the de'il.

"A cutler keen is our R. K. C.,
No barber can shave you as closely as he;
He has brass for brains, and in woe or weal,
He is never the man that objects to *steel*."

sented a majority of loyal votes. Louisiana, however, according to the report, was still in a state of insurrection against the United States government, and Cutler and Smith could not be admitted until both houses of Congress had recognized an existing state government. But the Senate took no action on this report, and the Louisianians were never admitted to seats.

Louisiana's claims to representation fared no better in the House than in the Senate. Although it had been intended to elect five congressmen when the legislature was elected in September, it was found possible to hold elections for only two—F. Bonzano in the first district and A. P. Field in the second. When these two presented themselves for admission to Congress, the committee disagreed as to the validity of their claims, and submitted two reports to the House. The majority report was favorable to the applicants; it declared that they had been elected "by the loyal people of Louisiana and that these loyal people constitute a majority of the people of the State." The minority report contradicted that of the majority in every particular; it might have been written by Durant himself. The House consoled the applicants by paying their expenses, but practically rejected their claims by postponing action on the report until the next session. As the war was still waging, it was thought that no fixed plan of action could wisely be decided on.

A joint resolution recognizing the state government adopted in Louisiana met the same fate. It was introduced into the Senate along with the report of the Judiciary Committee and gave rise to a warm discussion. Sumner of Massachusetts championed the cause of the negro, stating that Louisiana should not be admitted unless upon the fundamental condition that suffrage be not denied on account of race. General Wadsworth, he said, had talked with a planter of Lafourche parish who said that his hope and expectation was that slavery would be restored in some form, and that if the North withdrew from the South, the arms of negro soldiers would be taken away. Although

Reverdy Johnson had prophesied that even if Louisiana were admitted on condition of negro suffrage, the State could not be estopped later from excluding the blacks, Sumner was persuaded that the best protection for the negro was the ballot. As to the existing government in Louisiana, he described it with bitter sarcasm as "a mere seven-months' abortion, begotten by the bayonet in criminal conjunction with the spirit of caste, and born before its time, rickety, unformed, unfinished—whose continued existence will be a burden, a reproach, and a wrong."¹ This startling metaphor seems to have put an end to all discussion for the time, and no definite action was ever taken on this resolution.

Such was the status of Louisiana up to the death of Lincoln in April, 1865. It seemed a favorable sign that the committees in both houses of Congress had reported in favor of recognizing the government established under the president's policy; but it was an equally unfavorable sign that Congress as a whole did not commit itself to such a policy. It is true that Louisiana's ratification of the thirteenth amendment was accepted, but this was the only sign of recognition. Even the electoral vote of the State for president, which was sent to Washington in January, 1865, was rejected, the two houses declaring that States in rebellion were not entitled to be represented in the electoral college.²

To the brief history just given of the government of Louisiana in its executive and legislative aspects during the Civil War should be added a still briefer description of the judiciary so far as it was established by the Federal authorities. This phase of military rule in Louisiana was not without its peculiar and interesting features.

After the occupation of New Orleans in 1862 the sessions

¹ Annual Cyclopaedia, 1865, pp. 287, 289.

² Some effort was made to except Louisiana from this ruling on the ground that the State had been reorganized, but it was successfully opposed, a member urging that no one was sure about Louisiana. The motion was lost by a vote of 15 to 22. The Chicago Tribune ridiculed Louisiana for appointing presidential electors, as an absurdity in a State the larger portion of which was dominated by the rebel army. Times, December 9, 1864. Cox, Three Decades, p. 342.

of the existing courts of the old régime ceased. Some of the judges took refuge within the Confederate lines, and at least one who remained refused to act. The general in command, therefore, appointed military officers to hold courts. In June, 1862, progress was made by the institution of a provost court—a military court which, in default of any better, was charged with the trial of criminal cases and, finally, even of civil matters. Though this court was continued until August, 1863, it was so entirely inadequate that under General Shepley an attempt was made to give regular courts to the State. The old courts were opened with a somewhat changed jurisdiction, and appointments were made to take the places of the judges who had disappeared. The second district courts of New Orleans thus came into existence with such “loyal” men as J. G. Whitaker and Rufus K. Howell as judges.¹ Later, the first and third district courts were also opened, with two recorder’s courts.

The most extraordinary court of this or any other period of American history was the “Provisional Court” established by President Lincoln. Seeing the importance of having a higher court of justice in a city as large as New Orleans, the president, on October 20, 1862, issued the following order: “The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of maintaining justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a Court of Record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a Provisional Judge to hold said Court, with authority to hear,

¹ Annual Cyclopaedia, 1863, subject “Louisiana,” p. 586.

try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceeding, so far as possible, to the course of proceedings and practice which has been customary in the Courts of the United States and Louisiana—his judgment to be final and conclusive.” The said judge was to establish rules and to appoint a prosecuting attorney, a marshal, and other officers, but these appointments were not to extend beyond the military occupation of New Orleans. The salary of the judge was fixed at \$3500 a year, his salary and that of the other officers being ordered to be paid out of the contingent fund of the War Department. Judge Peabody accompanied Banks’s expedition to New Orleans in the latter part of 1862, and his court was opened in that city in the month of January, 1863. It followed the laws of Louisiana in criminal matters, and, as far as altered conditions would permit, all other laws of the State. Being a military court, it was required to regard as paramount all orders of the general of the department.¹

It seems to have been thought in Louisiana that the president had established this court to pass upon the confiscated property of rebels,² and that it had failed to do its duty. It was urged that fifty or sixty libels had been brought before it, and that the court had not acted upon them. The truth is that the court had seen proper to limit its own jurisdiction. As it had been created not by the Constitution and laws of the United States but by the executive exercising powers conferred on him by the law of nations, it held that it had no jurisdiction in prize cases, and it seems to have held that there was a similar lack of jurisdiction in cases of confiscation. The latter question was argued before the court, but before a decision was reached the United States

¹ Annual Cyclopaedia, 1863, subject “Provisional Court for Louisiana,” p. 770.

² Debates in Convention, 1864, p. 519.

district court was established in New Orleans (1863), and to it were transferred all the confiscation cases.¹

The chief reason for the establishment of the court, however, was to decide controversies in which foreign residents of New Orleans were concerned, and which were likely to bring about international complications. In these matters it was so successful as to prevent all complaints of the foreign population of the city from reaching the State Department. Moreover, in several capital cases that were brought before it convictions were obtained, which were held at the time to be rare occurrences in New Orleans.

Its power was naturally questioned. Its deputy marshal once served a process at Morganza with a force of a thousand cavalry.² Secretary Seward once said, half jokingly, that the provisional court of Louisiana exercised more powers than the Supreme Court of the United States.³ Nor did the great powers of this court escape adverse criticism in Louisiana. The *New Orleans Times*, July 9, 1864, in an editorial, declared that if the judge had not asserted less authority than his commission vested him with, much disorder would have crept into judicial affairs. As it was, many anomalous proceedings not within the cognizance of Louisiana law or practice had taken place. The court, it continued, was not a desideratum, and if the views of the convention (then sitting) had any weight with the military authorities, it had probably reached its end.

In 1864 Judge Peabody, in answer to criticisms of his authority, gave out a defence of the court over which he presided. He argued that his court was legal in international law because the president of the United States, as commander-in-chief, had conquered Louisiana, and in conquered territory such a court could lawfully be established. Though he admitted that some kind of civil government had been reestablished in the State, his court would continue to

¹ *Annual Cyclopaedia*, 1863, subject "Provisional Court for Louisiana," p. 775.

² Judge Peabody, "Provisional Court for Louisiana," *International Review*, May, 1878, p. 319.

³ *Ibid.*, p. 322, note.

exist until disestablished by the Federal government. In support of his position he cited the establishment of similar courts in California and elsewhere.¹ The validity of this remarkable tribunal was afterwards fully sustained by the Supreme Court of the United States.² At the end of the Civil War Judge Peabody resigned and returned to New York. By act of Congress, of July 28, 1866, the provisional court was formally abolished, all proceedings therein being transferred to the United States district court for the eastern district of Louisiana.

In April, 1863, though the provisional court had been in session for more than two months, Military Governor Shepley decided to reorganize the supreme court of Louisiana.³ To the office of chief justice he appointed Judge Peabody, who had agreed to attend at the provisional court an hour earlier in the morning and adjourn in time for the supreme court. But as the associate justices appointed seem to have declined, the latter court never existed except in name. While the constitutional convention of 1864 was in session, the state auditor reported to that body that Chief Justice Peabody had been allowed to draw \$3541.66 in salary from the State, for which he had rendered no service. This report excited some indignation in the convention, and it was proposed to bring suit against Peabody for the amount. Another member, however, urged that the judge should not be condemned unheard, and nothing further seems to have been done in the matter. The constitution of 1864 having provided for a complete judiciary, Governor Wells, in March, 1865, appointed a full bench, consisting of W. B. Hyman, chief justice, with Zenon Lebauve, R. K. Howell, John H. Ilsley, and R. B. Jones⁴ as

¹ Annual Cyclopaedia, 1864, subject "Louisiana," pp. 480-485.

² 9 Wallace, 129; 22 Wallace, 297.

³ The New Orleans Times of February 21 demanded the reorganization of this court.

⁴ Judge Jones died of cholera in 1865, and was succeeded by J. G. Taliaferro. Jones's qualifications for his high office were not generally recognized. It is related that when he asked to be "qualified," the judge to whom he applied said, "I will swear you in; all h— couldn't qualify you."

associates. This court rendered its first decisions in May, 1865.

The Confederate lawyers, who were now returning to the city, poor, needy, tired of war and politics, were enabled to practice in the state courts¹ under the general amnesty proclamation or the special pardons of President Johnson; but in the United States circuit and district courts they were still refused the privilege unless they took the iron-clad oath of 1862, which in 1865 had been extended by Congress to include practice in the United States courts. The large cotton cases in these courts furnished such heavy fees to the lawyers that some secessionists stretched their consciences and took the oath, while their more scrupulous colleagues had to content themselves with such scraps of business as fell to them in the state courts.²

¹ The supreme court was reorganized by the Democratic legislature by act approved March 13, 1866.

² Address of B. F. Jonas in *Times Democrat*, May 5, 1901.

CHAPTER VI.

RECONSTRUCTION IN LOUISIANA UNDER PRESIDENT JOHNSON.

We have seen that, in spite of the protest of prominent radicals in the summer of 1864 and the opposition of the majority of Congress in the winter of 1865, President Lincoln persisted in declaring that his policy for the reconstruction of Louisiana was both constitutional and wise and in urging on Congress its adoption. To him, rebellion in the South had not appeared as a secession of States, but as an insurrection of individuals, resulting from a conspiracy of the prominent leaders.¹ Holding this view, it seemed to him only natural that in exercise of the pardoning power granted him by the Constitution he should extend an amnesty to those who had been misled, and, as commander-in-chief, should aid them in reconstructing their civil government. Congress, he hoped, would aid him in this good work by accepting representatives from the seceded States as fast as they returned to their allegiance. Alas for his plans, the great president fell by the hand of the assassin only five days after General Lee had surrendered at Appomattox Court House.

It has been held by many northern writers and most southern ones that had the life of Lincoln been spared he would have been able, by virtue of his sound judgment and his immense popularity, to carry out the plan of reconstruction begun in Louisiana and to extend it to the rest of the South, thus saving that section from the horrors of congressional reconstruction. To the present writer, however, this view of the matter seems unsound. That Lincoln was far better suited by nature than his tactless successor, Johnson, to soften the asperities of radical legislation is un-

¹ The truth, however, is that the people carried the leaders into secession, and that Jefferson Davis himself was in favor of delay. Rhodes, *History of the United States*, III, 276.

doubtedly true. The great soul of the president was absolutely free from any feeling of bitterness toward the southern people. While he was ready to combat to its final destruction the theory of state sovereignty and the extension of slavery, he had learned to view the attitude of the South with that large charity which inspired the hearts of so many officers who took part in the conflict on the northern side, the same sentiment that was exhibited in the relations between Grant and Lee at Appomattox. But this sentiment was not widely shared by the members of the national legislature, who were not fighting but were making laws for the Union. That Lincoln would have been permitted by the Congress that met in December, 1865, to recognize state governments established on the one-tenth basis and to make easy the road for the return of "rebels" seems highly improbable. Is it likely, moreover, that he could have prevented the Southern States at the close of the war from exasperating the feelings of the Republican majority in Congress by unwise vagrant laws, and by premature attempts to restore "rebels" to a participation in state and Federal legislation? Or could he have persuaded this Congress to relinquish its determination to deny the suffrage to the "rebel" for his punishment, and to grant it to the freedman for his protection and for the perpetuation of party supremacy? Such influence would doubtless have been beyond the power even of Lincoln's greatness.

If this view is correct, it is not surprising that Lincoln's successor should have found the task impossible. Its difficulty had been enormously increased by the coming of peace. The return of the Confederates to their homes complicated the problem of establishing civil government in the seceded States, while at the same time the executive ceased to exercise the great powers granted him in time of actual war.¹

¹ It is to be noted, however, that under Johnson's policy Texas did not reconstruct itself until February, 1866, and the rebellion was not officially declared to be ended until April 6, 1866. Cambridge Modern History, VII, 626. On April 2 Johnson declared insurrec-

President Johnson, though a Union Democrat, had been reared in a slaveholding State, and one would suppose that he could have suggested a policy to which both the North and the South would lend their support. But Johnson had risen from the ranks of the proletariat;¹ and in spite of his honesty of purpose and the logical reasoning which he always displayed, he had brought up with him a certain coarseness of fibre and an extraordinary lack of good taste which ruined his influence with the ruling faction in Congress. At the same time, he had a deep dislike of the southern aristocrats, who, he believed, had been guilty of treason in bringing on the war. He had been opposed to the mild terms conceded to General Lee by General Grant at Appomattox, and had wished Lee and his army to be held as prisoners. Soon after he had become president, he had declared treason to be the blackest of crimes. He expressed a desire to force into exile or hang Jefferson Davis, Toombs, Slidell, Benjamin, and other prominent rebels.² As late as February, 1866, Johnson said, "I know there has been a great deal said about the exercise of the pardoning power as regards the executive; and there is no one who has labored harder than I to have the principals, the intelligent and conscious offenders, brought to Justice; and have the principle vindicated that Treason is a crime."³

tion at an end except in Texas, and on August 20, 1866, he gave official notice of its cessation in Texas. Burgess, *Reconstruction and the Constitution*, p. 103. The Supreme Court has accepted these dates as the legal close of the war. *The Protector*, 12 Wallace, 700.

¹ He was a tailor by trade, and, it is said, was taught to read by his wife.

² Blaine, *Twenty Years*, II, 3-9.

³ In 1866 Congress voted to try Jefferson Davis for treason. There seemed "no way to write an indictment of a whole people," to borrow the words of Burke, but at least the arch offender might be punished. Accordingly, it is said that Attorney-General Speed, Judge Clifford of Massachusetts, William M. Evarts, and a half a dozen other prominent lawyers assembled at Washington to discuss the question. But the prosecution was abandoned, and Judge Clifford declared, "The laws of the United States, remarkable as it may appear, are not so constructed as to afford any certainty of punishing high treason or rebellion." Indictment for treason was finally brought against Davis, but on a writ of habeas corpus he was released on one hundred thousand dollars bail. Horace Greeley was

While, therefore, President Johnson went further than Lincoln in his desire to punish southern leaders and thus aligned himself more closely with the extreme Republicans, he did not satisfy that party in the measures which he took for the reconstruction of the South. Here he followed too closely the policy outlined by Lincoln. On May 29, 1865, he proclaimed a general amnesty to those taking an oath of allegiance, with the exception of certain classes which had taken a prominent part in the rebellion. Even these could return to their allegiance by seeking a special pardon from the president.¹ Later, each rebellious State was permitted, if it had not already done so, to frame its own government under a provisional governor. This act of amnesty surprised those who had heard Johnson's earlier fulminations against traitors, and it was maintained that there had been a change of attitude on the part of the president, due partly to the fact that the southern leaders flattered him, and partly to the persuasive tongue of Secretary Seward, who favored a conservative policy toward the South. A recent biographer of Seward, however, maintains that these views are "chiefly assumption and imagination and tend to conceal the facts." "No one ever produced evidence," says the writer, "showing that Johnson needed to be convinced that the work of reconstruction could be best directed by the executive department of the government. And before Seward was able to talk² without great pain Johnson had begun to follow the course Lincoln had laid out for himself."³ Whatever may be the truth as to this contention, Johnson showed himself, according to the Republicans, too indulgent toward the South

the first surety. The government nolle prossed the case. Horace Greeley writes, May 31, 1866, that "Messrs. O'Connor and Shea, counsel for Jefferson Davis, will appear in Richmond on Monday next, at the opening of the U. S. Circuit Court there, expressly to urge on the trial of their client." Chase Correspondence, p. 514.

¹ By March, 1867, Johnson had issued three hundred and fifty special pardons to inhabitants of Louisiana who were in the excepted classes.

² Seward had been dangerously wounded by an assassin on the night when Lincoln was murdered.

³ Bancroft, *Life of Seward*, II, 447, note.

and too anxious to assume the powers of recognition that were claimed by Congress. If anything more was needed to alienate the sympathy of the radicals it was found in the fact that Johnson, like all persons of his social class in the South, disliked the negro, and had no real desire to give him either political or social equality. Herein he held distinctly less advanced views than Lincoln, and was far behind the extreme views of the radicals.

The political status of Louisiana during the first half of the year 1865 was not clearly defined. Both Lincoln and Johnson had recognized the state government as organized by General Banks, but Congress failed fully to recognize the State as restored to her place in the Union. A partial recognition, however, was given by accepting the ratification of the thirteenth amendment by Louisiana, and by permitting a draft of soldiers within the Federal lines and assigning quotas to the various parishes.¹

Louisiana had suffered severely from the operations of the hostile armies which had occupied her soil, and it was no easy task to rehabilitate the prosperity of the State. The demoralization incident to such a war as had been waging was intensified by the fact that a portion of the State had been held by Federal troops throughout a great part of the conflict, and thousands of negroes had taken advantage of their opportunity to leave the plantations and take refuge within the Federal lines. They had also to a great extent taken up the idea that emancipation from slavery meant that the government which had freed them would present to each freedman as a Christmas gift in the following December a mule and forty acres of land, confiscated from the estates of the former masters.² No arguments of the Federal officers could persuade them that this Utopian scheme was not to be realized.

Major-General Hurlbut of the Federal army in an address painted in vivid colors the condition of the State within

¹ Annual Cyclopaedia, 1865, subject "Louisiana," p. 508.

² Fleming, "Forty Acres and a Mule," North American Review, May, 1906.

the Federal lines. "Let me call your attention," he said, "to this fact: the resources of this State are infinitely reduced by the casualties of war. The commerce, whose innumerable wheels used to vex the turbid current of the Mississippi, has passed away—the result of war. Plantations which used to bloom through your entire land, until the coast of Louisiana was a sort of repetition of the garden of Eden, are now dismantled and broken down. Trade, commerce, everything, crippled. . . . With all these things, this newly organized State of Louisiana has to confront difficulties such as never beset any community of men before. You have to create almost out of nothing. You have to make revenues where the taxable property of the State is reduced almost two-thirds. You have to hold the appliances and surroundings of government, and maintain them. All this you have to do out of a circumscribed territory and a broken-down country. Hence there is eminent practical wisdom in the suggestion contained in the address you have just heard, that the most rigid and self-denying economy should be exercised in all these relations which you hold to your fellow-citizens. Gentlemen, let me give you a few facts. The United States supports today 14,600 poor people here in the city of New Orleans. The same United States . . . is maintaining and keeping up to a great extent nearly every charity which belongs to the city or State. The levées, on which the life of your country depends, which from local causes cannot be repaired by the civil authorities, must be attended to by the United States, and the sum of \$160,000 is being laid out now by the United States for the purpose of preventing this delta of the Mississippi from being subject to overflow. Now, in view of this state of things, if you desire to take these matters off the hands of the General Government, look to it well that you have the means to carry out the necessities of the times, and the power to compel observance."¹

The Confederates, who after the surrender of Lee and other southern commanders came crowding back to the

¹ Annual Cyclopaedia, 1865, subject "Louisiana," p. 510.

State, showed a strong desire to take General Hurlbut at his word and to assume the burdens hitherto borne by the United States government. Both by self-interest and by the president's proclamation of amnesty they were encouraged to undertake the task of self-government, and to restore their broken fortunes.¹ Under the proclamation of amnesty those falling below certain ranks and possessing less than \$20,000 worth of property were enabled, by taking an oath of allegiance, to be restored to citizenship; and many in the exempted class sought a special pardon of the president, and obtained it. Abandoned property, unless it had been condemned in the United States courts, was restored to those who had been pardoned. Where real estate had been confiscated and sold by the government the Confederates bought it back from the purchasers at a reasonable figure, being much aided by the resolution of Congress that "no punishment or proceedings under said act [Confiscation Act of July 17, 1862] should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."²

The Confederates were further aided by the attitude of Governor Wells, who, on March 4, 1865, on the election of Governor Hahn to the United States senatorship, had succeeded from lieutenant-governor to governor. Having been recognized by President Johnson as the legitimate governor of Louisiana, he was so far from showing any harsh feeling toward the returning rebels that he actually strove to win them over by every means in his power. He recommended to the president for executive pardon many who fell within the excepted classes. Offices were given them, and they were constantly called into consultation. All recollection of

¹ General Richard Taylor says that at the close of the war his plantation had been confiscated, and his property consisted of two horses, one of which was lame and unfit for service.

² The effect of this joint resolution was to give those purchasing the confiscated property of absent rebels the enjoyment of said property only during the lifetime of the rebels. Hence such purchasers, having only a precarious tenure, were willing to resell to the old owners.

the fact that he had been forced to flee his home on account of his Union proclivities seemed to have vanished from his mind. It afterwards became clear that Wells was merely seeking political advancement, and that he saw in the votes of the ex-Confederates the best chance of reelection to the gubernatorial office.

One of Wells's most important acts after his elevation to the governorship was to displace Captain Hoyt, the mayor of New Orleans, and to give that office to Dr. Hugh Kennedy. This action created somewhat of a sensation among the radicals and even among Banks's adherents, for Hoyt was an appointee of Banks and a supporter of Hahn, while Kennedy was regarded as an unregenerate pro-slavery man. Denison wrote on the day that Kennedy entered upon the duties of his office (March 21, 1865) that though the alleged reason for the appointment of Kennedy was that the office ought properly to be held by an old citizen, the real reason was that the mayor of New Orleans, through the police and other agencies, almost completely controlled the city elections, and through them the state elections.¹ Hence it was believed to be a clever move on the part of Wells to strengthen his own position.²

Governor Wells, however, now proceeded still further in opposition to the policy followed by General Banks. On May 3 he issued a proclamation rejecting the former registration of voters made under Banks, and ordering a new one for the elections that were to take place in the autumn. His plea was that the late register of voters in the city of New Orleans, J. Randall Terry, had made an official state-

¹ Chase Correspondence, p. 456. The official head in New Orleans after Monroe (1862) was first, G. F. Shepley, post commandant, then Godfrey Weitzel, Jonas H. French (provost-marshal acting mayor), Captain Miller, Captain Hoyt, and Hugh Kennedy. Kennedy was displaced later by S. Quincey, and then restored, and finally yielded to Monroe, elected 1866. *Annual Cyclopaedia*, 1866, subject "Louisiana," p. 449.

² Senator B. F. Jonas, however, says that his party soon came to regard Kennedy as a Union man and a scalawag, and were desirous of putting him out. He also says that his party soon became antagonistic to Wells because they wanted new elections over the State, while Wells wanted to keep his appointees in office.

ment under date of March 6, 1865, that nearly 5000 persons were registered as voters who did not possess the qualifications required by law.¹ It was also maintained, though the governor did not refer to the matter, that many of those registered were negroes.² General Banks, under whom the registration was made, was so anxious to secure a large vote for the ratification of his government that it is not surprising to find that many irregularities existed in the registration; and such irregularities naturally cast a shadow on the legality of the ratification of the constitution of 1864 and the elections held under it. It was evidently not expected that the governor would take issue with General Banks on the subject of registration, for when his proclamation appeared it created quite a sensation in New Orleans.

In June the governor issued another proclamation—this time to the country parishes—urging them promptly to organize civil governments. Until elections could be held for the formation of such governments, he said he would appoint sheriffs, recorders, police jurors, and other officers, but he would appoint only such capable men as the people of each parish might nominate. Local organization, accordingly, was pushed forward energetically, and the newspapers nearly every day contained notices of fresh appointments by the governor.

The government of the State seemed to have become a government by proclamations; for on September 21 another proclamation appeared, announcing that on November 6 an election would be held in every parish in the State for the choice of a governor, lieutenant-governor, secretary of state, treasurer, attorney-general, superintendent of public education, representatives in the legislature, state senators in place of those whose term of office had expired, and representatives in Congress. The qualifications of voters required by law were also given. They embraced all male whites twenty-one years of age, who had been residents of the

¹ Page 88.

Annual Cyclopaedia, 1865, subject "Louisiana," p. 510.

State for the twelve months preceding the election, and who had taken either the iron-clad oath of December 8, 1863, or the amnesty oath of May 29, 1865. Those excepted from the amnesty must be pardoned by the president. Moreover, the governor ignored the constitution of 1864 so far as to declare that in all other respects the election would be conducted in accordance with the law, which was the same as under the constitution of 1852.¹

There was great diversity of opinion among the voters of Louisiana as to the best platforms to be offered to the public for the coming elections, a diversity which reflected on a small scale the factions into which Congress itself was divided. As to the returning Confederates, they seem to have been for the most part desirous of renewing amicable relations with the state and the Federal government. They accepted in good faith the proclamation issued on June 2, 1865, by Governor H. W. Allen, which said, "The war is over, the contest is ended, the soldiers are disbanded and gone home, and now there is in Louisiana no opposition whatever to the Constitution and laws of the United States." Allen, moreover, had transferred to the Federal military authorities (Louisiana was still under martial law) all the important records of his government.² In his inaugural address a few years before he had said, "Give Louisiana to some foreign power rather than return into the Union;" but he had been a gallant leader in war and peace, and the Confederates were as ready to subscribe to his present sentiments of allegiance as they had been to follow him in the desperate venture of secession. The testimony of Governor Wells himself was that the soldiers returning to their homes were wiser and better men, frankly owning to the failure of their experiment, and all expressing a desire to atone for the

¹ In calling for a new election, however, the governor's action was based on the constitution of 1864, which provided for the election of new representatives to the legislature in November, 1865, as well as for the other officers mentioned in the governor's proclamation. Only half the state senators were to be chosen, the other half being elected for four years.

² *Annual Cyclopaedia*, 1865, subject "Louisiana," p. 510.

errors of the past by cheerful obedience to the government. In fact, as we shall see, the ex-Confederates were soon regarded by the radicals as somewhat over eager to be restored to proper relations with the Federal government and to offices under it; and when, in the winter of 1865, they came knocking at the doors of a Congress which a few short months before, it was remembered, they had wished to batter down, they met with a cold reception. Nor was the behavior of the Confederates anything but friendly toward the Banks party that had framed the constitution of 1864 during their absence; they even joked with the members of the convention on the results of their labors. The constitution, it is true, was regarded as a fraud, but under the favor of Governor Wells and the president they (the Confederates) hoped to change all that at an early day.

Many northern men, ex-officers in the Federal army, and others less worthy had found Louisiana an attractive place of residence, and had determined to cast in their fortunes with its people. Some question seems to have been raised as to how they should be treated by the returning natives. The popular attitude on this question was doubtless expressed by a Democratic paper which said: "We do not desire the newcomers to regulate our domestic institutions, furnish laws, or administer them. We have a sufficient number of competent men to do this."¹ However, the same paper, a few days later, hastened to say (rather inconsistently, declared a rival contemporary) "that in spite of much bigoted prattle, there was no design in any respectable class to regard with prejudice or suspicion, immigrants or settlers, bringing capital, energy, or talents." It is not impossible, however, to reconcile the two statements: capital, energy, and talents were desired, but the old inhabitants were not ready to surrender the reins of government to strangers, ignorant of the conditions and needs of the State. Especially was the prejudice strong against the radical Northerners, who had now come out decidedly in favor of negro suffrage.

¹ Picayune, July 2, 1865.

The Democrats in setting forth their principles declared strongly against negro suffrage. A meeting of Democrats was held in New Orleans on October 2, 1865, over which ex-Governor Wickliffe presided.¹ The resolutions adopted declared in favor of President Johnson's policy of reconstruction, but went on to say that "this is a government of white people, made and to be perpetuated for the exclusive benefit of the white race. In accordance with the constant adjudication of the Supreme Court of the United States, the people of African descent cannot be considered citizens of the United States, and there can in no event nor under any circumstances be any equality between white and other races." On October 14 there was another mass-meeting of Democrats at which ex-Confederates C. E. Fenner and B. F. Jonas spoke in praise of Johnson and Wells. Jonas declared that Wells had not only welcomed back the returning soldiers, but had avowed himself the champion of their rights. The Democrats, however, declared the constitution of 1864 to be the creation of fraud, violence, and corruption, but said it should be recognized as the *de facto* government of Louisiana until another could be organized; and they claimed the right to petition Congress for compensation for the slaves that had been emancipated. All Democrats were urged to join in opposition to the radical party "which wishes to consolidate government on the ruins of our State institutions." Governor Wells, having been recognized by the president,² was seen to be the safest candidate for governor, and accordingly he received the nomination of this party.³

¹ The vice-presidents were W. W. Pugh, O. N. Ogden, Leon Burthe, and the secretary was B. F. Jonas. *Times*, October 3 and 4, 1865.

² A letter of Wells, dated June 10, 1865, says he recently visited the president, and was assured that he would be sustained in all necessary and legal measures to organize and uphold civil government. Schurz's Report to President Johnson, 39th Cong., 1st sess., S. Ex. Doc. No. 2, p. 54.

³ Previous to this time, in September, the National Democrats had advocated a return to the constitution of 1852, while another faction, the Conservative Democrats, had advocated the acceptance of the

In advocating Johnson's policy, it will be seen, the Democrats did not follow him in the more advanced position which he had assumed in the preceding August. Johnson had then become aware that it was unwise not to make some concessions to the radicals, and thus to cut the ground from under their feet. Accordingly, he had sent a despatch to Governor Sharkey, the provisional governor of Mississippi, saying: "If you could extend the elective franchise to all persons of color who can read the Constitution of the United States in English, and write their names, and to all persons of color who own real estate valued at not less than \$250.00, and pay taxes thereon, you would completely disarm the adversary, and set an example the other States will follow. This you can do with perfect safety, and you thus place the Southern States in reference to free persons of color upon the same basis with the free States. I hope and trust your Convention will do this, and as a consequence the radicals who are wild upon negro franchise will be completely foiled in their attempt to keep the Southern States from renewing their relations to the Union by not accepting their Senators and Representatives." The president, in thus adopting a suggestion which Lincoln had made to Hahn in 1864 (though Lincoln's motive was a higher one), showed his political sagacity; and could the South have looked forward a few years into the future, this part of the president's policy might have been adopted in 1865. But at this time the South, feeling that the president had no real desire to extend the suffrage to the negro and suggested it merely as a matter of expediency, concluded to ignore the suggestion and not rashly to set the door ajar for the entrance of the negro to political rights. If we consider the question without doctrinaire prejudices, we shall see that it would have been a most extraordinary proceeding on the part of southern Democrats to confer the franchise on a class of

constitution of 1864 until the meeting of another convention. A month later the latter platform had been appropriated by the National Democrats. *Annual Cyclopaedia*, 1865, subject "Louisiana," p. 512.

persons who had just been emancipated from slavery, when nearly all the Northern and Western States at that time refused the suffrage even to negroes who had been born free. It was natural that they should expect to return to the Union without being required to make so radical a concession.

The Democratic platform proved unacceptable to the remains of the old Banks faction, now called the "National Conservative Union" party, which came forward to oppose what they alleged was a return to the constitution of 1852. Their platform did not favor negro suffrage, but it did not mention compensation for slaves. It upheld the constitution of 1864, repudiated the Confederate debt, and condemned secession. Its nominee for the office of governor was also Wells, but for the rest of the ticket its nominees were different.¹ Wells, wily politician that he was, gladly accepted both nominations, declaring that he did not see much difference between the two platforms, and that he was strictly a party candidate.²

But another faction, though few in numbers, were unable to accept Wells; they declared that the governor "was trying to carry water on both shoulders" and could not be trusted. Some of these, devoted friends of ex-Governor H. W. Allen, who was at this time in Mexico, determined upon him as their candidate for governor. This measure did not please those Democrats who had found it expedient to nominate Governor Wells; they declared that nothing could be

¹ The tickets were as follows:—

	Conservative Union.	National Democratic.
Governor	J. M. Wells	J. M. Wells
Lieut. Gov.	J. Q. Taliaferro	Albert Voorhies
Secty. of State	T. J. Edwards	J. H. Hardy
Treasurer	J. T. Michel	Adam Giffen
Auditor	C. M. Olivier	J. H. Peralta
Att'y-Gen'l.	Geo. S. Lally	A. S. Herron
Supt. Pub. Ed'cn.	R. C. Richardson	R. M. Lusher
	Judge E. Abell	Louis St. Martin
	A. P. Field	Jacob Barker
Congress	William Mithoff	R. C. Wickliffe
	Al. Duperier	John E. King
	John Ray	John S. Young

² Times, October 13, 1865.

more unwise than the nomination of a man who would be persona non grata to the authorities at Washington. Accordingly, E. W. Halsey and other prominent Democrats issued a circular withdrawing Allen's name;¹ but in spite of this fact he was so popular in the Red River country that he received a vote of 5497.

In the election Wells polled a vote of 22,312,² and the rest of the Democratic ticket was elected by a large majority. The returns showed how far the voting under Banks had failed to represent the State; it showed further the determination of the State to accept in good faith the executive plan of reconstruction.

In the meantime the radical Republicans had been holding meetings at which such speakers as Dostie, Warmoth, and Durell upheld the policy of Johnson in terms, but insisted that the leaders of the rebellion should be disfranchised forever, that the rank and file of the rebels should be permitted citizenship, and that all loyal men (white and black) should be "equal before the law." A committee of this party, calling itself the "Central Executive Committee of the Friends of Universal Suffrage," wrote to Wells in the early summer declaring that civil government in Louisiana on a limited suffrage had been a failure, and that as governor he possessed the discretion to order a registration of whites and blacks alike. Such a registration, they urged, should be made in the country as well as in the city. The governor answered that no registration had ever been made in the rural districts of any State. As to negro suffrage, he thought it neither wise nor expedient to grant it. If en-

¹ Allen afterwards thanked those of his friends who had tried to put down the movement that had been started in his favor. Dorsey, *Recollections of Allen*, p. 346.

² The vote for the chief officers was: Wells, 22,312; Allen, 5497; Voorhies, 23,004; Taliaferro, 5302; Hardy, 20,869; T. J. Edwards, 4181; Giffen, 21,667; Michel, 4773, etc. *Journal of the Senate*, 1865, pp. 25-27. The whole vote seems small when compared with the vote of 1860 (49,510), but it may be partly accounted for by the losses in the Confederacy. Of 15,000 men from Louisiana in Lee's army in Virginia, only 600 were reported as remaining. *Annual Cyclopaedia*, 1865, subject "Louisiana," pp. 513, 516.

dowed with the ballot, the freedmen would support their old masters, and Union men like himself and the committee would live by sufferance in the State.¹ It is impossible to say whether Wells really believed what he said;² certainly it was not believed by the radicals. It was declared by the Democrats that these radicals did not number two hundred whites in the State, but they were evidently determined not to allow the Democrats to carry things with a high hand without a protest. Adopting what was to be the view of the extreme radical element in Congress, they refused to recognize the existing government in Louisiana, declared that by secession the State had reduced itself to the status of a territory, and that as such it was entitled to elect a territorial delegate to Congress.³ In accordance with this view they assembled and elected delegates to a convention, which met in New Orleans on September 27. After a session of several days this convention adopted a platform and fixed November 6 as election day (the official date).

To the great disgust and indignation of the Democrats the election was actually held. It resulted in the choice of Henry Clay Warmoth as delegate.⁴ For the first time in the history of the State the negroes voted freely; and so delighted were they with this new privilege that they contributed of their means to defray the expenses of their delegate to Washington by depositing fifty cents or a dollar in a box at each polling place. The Democrats asserted that the negroes were assessed one dollar per capita, but the radicals denied that there was any assessment.⁵ War-

¹ Times, July 12, 1865.

² The New York Times, however, says, "Would not the negro vote with those on whom they are dependent?" July 8, 1865.

³ Of course this view was not original with Warmoth; Sumner had adopted it two years before. Sumner, "Our Domestic Relations," *Atlantic Monthly*, October, 1863, p. 523.

⁴ For his career, see *National Cyclopædia of American Biography*, X, 80.

⁵ However, in the petition which he addressed to Congress on February 2, 1866, Warmoth claimed that the voluntary contributions of the voters at Napoleonville, amounting to eighty dollars, together with the ballot-box, had been seized by the sheriff and his posse. It is therefore certain that the negroes were persuaded to contribute to the expenses of their indigent delegate.

moth afterwards claimed that some of his polling places were closed by the military authorities; but certainly the governor was not responsible for this opposition, for he had announced that unless the negroes tried to vote at the official polls they must not be interfered with.¹ In any case, Warmoth, who had no opponent, claimed that the vote cast for him was 19,000.²

On November 13 the radicals held a mass-meeting in New Orleans at which speeches were made by Flanders, Waples, and Warmoth;³ and resolutions were passed protesting against any attempts to substitute for slavery any system of serfdom or forced labor, and declaring that as the necessities of the nation had called the colored man into the public service in the most honorable of all duties—that of soldier, this fact, together with his loyalty, patience, and prudence, should assure Congress of the justice and safety of giving him a vote to protect his liberty.

In his special plea of February 2, 1866, Warmoth stated that the Democratic party had rejected the constitution of 1864 as fraudulent, which was exactly the position his party had taken. Louisiana had no valid civil government, and must depend on Congress to receive one delegate, like any other territory; for to the condition of a territory had it been reduced by its secession and rebellion. As to the existing government, he quoted Colonel A. P. Field as declaring that Governor Wells had received Confederate officers in his house when "their hands were still bloody with the blood of Union soldiers," and that Confederates had been registered without a pardon when they were worth over \$20,000, and had not been twelve months in the State. Moreover, two men who had said that negroes must vote and that blood would be spilt in defence of this right had been

¹ True Delta, November 7, 1865.

² The Tribune says that Warmoth claimed 2500 white votes. December 12, 1865.

³ Warmoth on this occasion said that he was going to get a Yankee to invent a machine that would pump out the black blood of negroes and pump in white blood, a statement which was received with great laughter and applause. Times, November 14, 1865.

arrested for seditious language, and bail had been refused on the ground that their offence was treason against the State of Louisiana.¹ Finally, threats had been made by Democrats that as soon as the Federal soldiers were removed from Louisiana, "all Union men and damned Yankees would have to go." The Times, a prominent newspaper, had said, moreover, that the attempt to deceive the negro by a solemn electoral farce was treason against the entire population, for it would sow the seed of bitterness between the two races; and that the charge of disloyalty was false, Louisiana being as loyal as Connecticut. The Southern Star, the organ of Wells, it said, had spoken in contemptuous terms of the radical meeting, saying: "The negro people—black and white—held a meeting last night (November 13). Some of the speakers will be taken in hand by the Grand Jury. As a matter of course we do not report the proceedings; no decent paper would."

With this extraordinary petition Warmoth presented himself at Washington, and took his place in the anteroom of the halls of Congress, with Randall Hunt and Henry Boyce, who had been elected senators by the Democratic legislature of Louisiana. But Congress, as we shall see, was not prepared to receive either the Democrats or such a radical member as the "delegate from the territory of Louisiana." It does not appear that Warmoth's claims were brought before Congress.² Perhaps he himself did not expect to be received after such an irregular election, but he is said to have got a great deal of amusement out of the campaign.

The legislature elected in November, 1865, represented the State as no other legislature had done since the beginning of the war. The senate consisted of twenty-seven members, part of whom, in accordance with the constitution of 1864, held office by virtue of the election of 1864.

¹ General Canby, the successor of Banks, released these two men.

² See Life of A. P. Dostie. The Tribune says that Warmoth presented his credentials to Clerk McPherson; and that Thaddeus Stevens told Warmoth that if Congress adopted the territorial form of government for the insurrectionary States, he (Warmoth) could claim his seat. December 9 and 13, 1865.

The lower house consisted of one hundred and six members,¹ and included such conspicuous names as B. F. Jonas, T. C. W. Ellis, Charles E. Fenner, James McConnell, John McEnery, and other prominent young lawyers just back from the battlefields of the Confederacy. The Democrats had carried every parish but one. This legislature met in extra session on November 23, 1865, in the old Mechanics' Institute, New Orleans. It sat until December 22. The extra session was called by the governor to consider the state debt, the labor question, and other local matters, but especially to elect two senators to be present in December at the opening meeting of the new Congress.

That Wells should counsel the choice of two senators when there were already two senators-elect, Hahn and Cutler, who had been chosen by a body over which Wells himself as president of the senate had presided, may seem remarkable; but it was plausibly argued that Hahn and Cutler had been rejected as not representing the State, and it was now time to try again with a reorganized State which ought not to fail of recognition. If Wells had desired the senatorship, he would have been elected; but he thought it wiser to hold on to the office he had. He received a complimentary vote; but the two candidates finally chosen were Randall Hunt² (term to begin March 4, 1865) and Henry Boyce (term beginning March 4, 1861).³ Charles Gayarré, the historian, was also a candidate.

Another question discussed by the legislature was that of calling a new constitutional convention. A committee was appointed the majority of whom reported in favor of submitting the question to the vote of the people, while the minority thought it would be wiser and cheaper to accept

¹ This was the number present by December 1.

² Hunt was a prominent lawyer, a native of South Carolina, who seems to have been a consistent Union man, while his brother, T. G. Hunt, fought for the Confederacy. In 1867 Randall Hunt was elected president of the University of Louisiana. He and Justice Chase married sisters.

³ On February 19, 1861, the legislature paid \$7000 to the representatives and senators. *Acts of Legislature, 1866*, p. 44.

the existing constitution, amending it so far as was found necessary. Both reports were laid over for consideration at the regular session of 1866. The most important matter considered was the labor question; but to understand the attitude of the legislature on this important subject it will be necessary to go back and consider, as briefly as possible, the economic status of the negro as it was during the Civil War and as it was affected by the close of hostilities.

In 1860 the slave population of Louisiana was 331,726, while the free persons of color numbered 18,647. According to this census, the white population had a majority of 7000; but when the summons of war came and thousands of the whites left the State to fight in Virginia and Tennessee, the colored population must have formed a large majority of those that were left.

No sooner had Butler assumed control of New Orleans and the surrounding districts than the question of what to do with the negro forced itself upon his attention. A year before, at Fortress Monroe, he had solved the question by an epigram. When some five hundred slaves took refuge in his camp, he refused to return them, and put them to work on his fortifications, declaring that they were "contraband of war." This witticism, winked at by the War Department at Washington, gave a new name to the slave; the North received it with applause.¹ Following the same view,

¹The application of "contraband" to persons was not new. The diplomacy of the United States had already made the law of contraband apply to persons as well as to goods. Cox says military enemies found on a neutral ship are classed under "contraband" by the United States. *Three Decades*, p. 265. Of course, Butler's application was new, unless slaves be regarded as enemies' goods and chattels. Rhodes says Butler applied the term first to three slaves, and by July 30 he had nine hundred. "The application of this phrase had not, as Butler himself admits, high legal sanction." *History of United States*, III, 466, 467. Peirce says: "Contrabands appeared with their wives and children, dependents to whom the contraband theory could not be applied." The War Department, moreover, wrote to Butler that the military authorities could lay no claim to fugitives, and that he must not interfere with the slaves of peaceable citizens or prevent voluntary return of slaves. Peirce, *Freedmen's Bureau, University of Iowa Studies in History*, 1904, pp. 5. 6.

the government, by act of Congress of August 3, 1861, declared that all property used in the aid of insurrection should be confiscated, and that owners should forfeit all claims to slaves whose labor was used in any service against the United States.¹ In the following year, moreover, the Confiscation Act of July 17, 1862, declared free the slaves of all persons in rebellion.² In the same year the War Department forbade the restoration to their masters of any slaves that took refuge in the Federal lines. Nothing further in the matter of regulations was done until the appearance of the emancipation proclamation, which, after due notice one hundred days before, was issued by Lincoln on January 1, 1863.

Enough, however, had been done to encourage many slaves, when the Federal camps were in their vicinity, to escape from the plantations and the toil of the fields and to throw themselves within the Federal lines, seeking at the hands of the army officers food, raiment, and a life of leisure. The exodus of slaves from the neighboring country parishes of the State into Baton Rouge, into Carrollton, and into New Orleans was so great as to strain the resources of the Federal authorities to support them. When the Federal army marched into a sugar parish, all was excitement among the negroes. It was like thrusting a walking stick into an ant hill, says Parton,³ the negroes swarmed out, quit work, and became servants of the officers, or camp followers. Ten thousand poured into New Orleans alone, and Butler, although evidently pleased that they should run away from their masters, had to issue orders that no more should be received at the various posts. Some planters, unable to make their slaves work, and unwilling to support them in idleness, actually sent them within the Federal lines, hoping to reclaim them later. This Butler tried to stop by

¹ This act, as we have seen, caused much indignation in the South, and led to retaliatory acts on the part of the Confederate Congress in regard to the confiscation of debts. See page 37.

² Schouler, *History of the United States*, VI, 222, note.

³ Butler in New Orleans, p. 489.

emancipating such slaves on his own responsibility, though he knew that Lincoln had revoked the orders emancipating slaves issued by Federal commanders in Missouri (1861)¹ and in South Carolina (1862).²

As the dark flood threatened to overwhelm the city, Butler's ingenuity devised a way out of the difficulty. He forestalled the method, which later was widely adopted, of seizing abandoned sugar plantations and working them for the benefit of the United States with the labor of "contrabands." His brother, Colonel Butler, who was making a large fortune by speculations under the patronage of the commanding general, had bought a standing crop for \$25,000, and now began to cultivate it with hired labor, white and black. Loyal planters in St. Bernard and Plaquemines were persuaded to enter into an agreement by which they were to pay wages—\$10 a month for able-bodied males—to their former slaves, and the military authorities became the nominal employers and controlled the conduct of the employees. Insubordination among them was punished by the provost marshal, generally by imprisonment in darkness on bread and water. This experiment seems to have been successful. A visitor to Colonel Butler's plantation, which was some distance below the city, describes the employees as working admirably under the promise of wages.³ In New Orleans the refugees were for the most part dependent on the bounty of the military authorities. Many of them became the servants of Butler and his officers; and as has already been noted, among the negro servants in New Orleans, to whom his door was always open, the commanding general had "a spy behind the chair of the master of every household."

In July, 1862, General Phelps, who was stationed at

¹ Fremont tried to free slaves only of those in rebellion, and Lincoln refused because he feared to lose Kentucky. Rhodes, *History of United States*, III, 470. Hunter went further; he declared free the slaves in Georgia, Florida, and South Carolina, and enlisted them. Peirce, *Freedmen's Bureau*, p. 4.

² Parton, *Butler in New Orleans*, p. 492.

³ Chase Correspondence, pp. 378, 379, 380, 409.

Carrollton, decided to utilize the negroes that were crowding into his camp by organizing them into companies to fight for the Union. He assigned as a reason for this action that "Society in the South seemed to be on the point of dissolution, and the best way to prevent the African from becoming instrumental in a general state of anarchy was to enlist him in the cause of the Republic. If his services were rejected, any petty military chieftain, by offering him freedom, could engage the negro for the purpose of robbery and plunder." Much to the indignation of General Phelps, Butler informed him that organization of "contrabands" into companies had not yet been authorized by the president, but that as Congress had authorized the employment of negroes in public service, Phelps might employ them in cutting down trees and forming abatis. This suggestion Phelps loftily rejected, saying that he was "no slave driver."

A few months later, however, Butler himself decided to carry "Africa into the War" by enlisting his friends, the free men of color.¹ Of the 28,000 colored persons in New Orleans, 10,000 were of this class. Frequently owning valuable property, and in many cases well educated, they overwhelmed Butler with attentions, and he found pleasure in dining at their tables. One of them, says Parton, gave the commanding general a banquet, at which the seven courses were served on silver plate. At another banquet a colored orator thought to eulogize the general by proposing as a toast: "Here's to General Butler. He has a white face, but a black heart," a sentiment which excited much amusement in the North as well as in the South.²

Butler recalled the fact that these men had fought with bravery under General Jackson at the battle of New Orleans, and though there was much dissatisfaction felt at their enlistment, they had been publicly thanked by Jackson for their services. Butler, moreover, was able to assign a

¹ Parton, *Butler in New Orleans*, pp. 505-507, 516.

² Cox, *Three Decades*, p. 425.

still stronger excuse for his action. The only body of negro soldiery organized in support of the Confederacy was composed of these free men of color from New Orleans. It is true that they never fought for the Confederacy, but in April, 1861, they had been accepted as part of the Louisiana state militia. In the following year,¹ when the state militia was reorganized (January 27, 1862), it was made up wholly of whites; but, a month before the fall of New Orleans, Governor Moore issued an order to the free men of color to maintain their organization and to be prepared to obey orders.² When the city was captured they did not retire with the regular troops; and when Butler called on them to enlist on the Union side, they eagerly accepted his invitation. Three regiments and two batteries of artillery, for the most part under white officers, were formed in a short time. It was the first colored contingent of the Federal army, as it had been the first and last such contingent of the Confederate army.³ Their complexion, according to Butler, was "about that of Vice-President Hamlin, or the late Mr. Daniel Webster." In November, 1862, they served under General Weitzel in his expedition to the Lafourche district; and the general protested against their use, declaring that the presence of colored troops tended to stir up the slaves against the women and children in that region. Butler calmly replied that if there were any insurrection, the rebels had only themselves to blame; let them submit, and thus

¹ *Times-Democrat*, April 30, 1903.

² Charles W. Gibbons (colored) testified that he was in the Confederate service for two weeks, but that as soon as Butler arrived, he and other free men of color wrote him a petition asking authority to raise a company. He says that when the rebellion broke out, the Confederates called on all the free people to do something for the Confederacy, and if they did not, a committee was appointed to look after them, and they would be robbed of their property, if not killed. Gibbons was advised by a policeman to enlist under penalty of lynching. He enlisted in Captain Jourdan's company, but resigned as soon as possible. Others had to enlist to save themselves. Some free men of color did not enlist. Report of Select Committee on New Orleans Riots, 39th Cong., 2d sess., H. Rept. No. 16, testimony, p. 126.

³ These free men of color were, of course, far superior in education and general enlightenment to the slaves.

obtain the protection of the Federal army against insurrection. But Weitzel offered his resignation, and it was not without much persuasion that he was induced to continue in the service.¹

Butler now went further. Anticipating the later policy of the Federal government, he began to enlist not only the free men of color but also the freedmen who had been set free by their owners or by the military courts, or had come in from the enemies' lines. In fact, if the fugitive negroes were brave enough to enlist, the general forgot to ask whether they were legally slaves or free.² As the proclamation of emancipation made the Federal government responsible for ex-slaves, the enlistment of freedmen naturally went on apace, and later General Banks maintained that the number in the Federal army from Louisiana amounted to 15,000. Many of them served with bravery at Port Hudson in 1863, and their devotion to the cause of the Union on that occasion and others was frequently urged at a later period as entitling them to the suffrage at the hands of the Federal government.

On the other hand, the Confederate authorities, recognizing the immense difference between the free men of color and the lately emancipated slaves, never enlisted the latter as soldiers, although it was suggested more than once that the experiment should be tried in retaliation. When the Federal government first adopted the policy, indignation at the South ran high. It was regarded as a measure unauthorized by the laws of civilized warfare, worse in its consequences than the arming of savages by the English in the Revolutionary War. Accordingly, Jefferson Davis, hoping to arrest the movement, issued a proclamation declaring "that negro slaves captured in arms should not be treated as prisoners of war, but should at once be delivered over to the executive authorities of the respective States from which they had been taken, to be dealt with according to

¹ O. G. Villard, "The Negro in the Regular Army," *Atlantic Monthly*, June, 1903, p. 721.

² Chase Correspondence, p. 316.

the law of the said States.”¹ This attitude of the Confederate authorities only exasperated the North, and called forth threats of retaliatory measures; it did not stop the enlistment of freedmen.² As the South refused to regard them as soldiers or to exchange them, the North assigned this as one of the reasons for stopping exchanges and leaving northern soldiers crowded in southern prisons. The main reason, however, was that a failure to exchange crippled the South more rapidly than the North; and General Grant decided to take advantage of this fact, declaring that a soldier that died in a southern prison served his country as well as one that died on the battlefield.³

The emancipation proclamation of January 1, 1863, as is well known, emancipated the slaves only in those States or parts of States then in rebellion. The president did not believe that he had the right to free the slaves in loyal States like Kentucky and Maryland, but in thus crippling the South he held that he was doing “an act of justice warranted by the Constitution upon military necessity.”

¹ Just before the surrender of Lee, however, the Confederate Congress, finding itself in desperate straits, decided to authorize President Davis, at his discretion, to arm negroes and grant them freedom, but it was already too late for this desperate venture. Cox, *Three Decades*, p. 213; and Garner, *Reconstruction in Mississippi*, p. 28. T. N. Page says that a number of negro regiments were enlisted in the Confederate army, one in Louisiana, and two in Virginia; but he does not say they fought. He says that if it had been permitted, more negroes would have enlisted in the southern army than in the northern (186,097). Page, “The Negro,” McClure’s, March, 1904, pp. 552 (note), 553.

² It is interesting to note that in our Revolutionary War the Continental Congress in December, 1777, ordered that all loyalists taken in arms in the British service should be sent to the States to which they belonged to suffer the penalty inflicted by laws of such States against traitors. Two prominent Quakers in Philadelphia, convicted of having assisted the English, were hanged. Lecky, *England in 18th Century*, IV, 108. The North maintained that at Fort Pillow and elsewhere no quarter was given to negro soldiers; and Grant told Lee that he would retaliate if negroes enlisted in the Federal army were not treated like whites. This action seems to have prevented the execution of negro prisoners according to state law. At least no such cases are mentioned by Smith. Smith, *Political History of Slavery*, pp. 150, 151.

³ *Annual Cyclopaedia*, 1865, subject “Congress, United States,” pp. 228-230.

Though it is held that the president had no further object than to cripple rebellious States by freeing their slaves, it was but natural that in the excited state of public opinion at that time the South should regard it as intended to stir up an insurrection among the slaves.¹ It is certainly extraordinary that such was not the effect. An explanation of the phenomenon will be attempted later.²

As far as Louisiana was concerned, the effect of the proclamation was much complicated by the fact that a portion of the State was occupied by Federal troops. All the slaves were declared to be free except those in the parishes of St. Bernard, Plaquemines, Jefferson, St. John the Baptist, St. Charles, St. James, Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans (New Orleans). These parishes, thirteen out of forty-eight, were assumed to be under Federal control, and consequently in them the existing slaves were left in a state of *de jure* slavery.³ What was the exact number of slaves in these parishes it is impossible to say. According to the census of 1860 they numbered 87,812. By January, 1863, this number may have been increased, for thousands of fugitive slaves had taken refuge within the Federal lines before this date, and these the proclamation evidently did not free. On the other hand, the number may have been less if Banks was right in 1864 in declaring that one fourth of all the negroes in Louisiana had died or left the State. Whether many of the planters in these parishes had emancipated their slaves of their own accord I have not been able to discover. The newspapers of the day made much of the case of J. Madison Wells, afterwards the Union governor

¹ Nor did the proclamation satisfy foreign powers, if we may judge by the criticism of Lord John Russell, who declared that the proclamation "makes slavery at once legal and illegal. There seems to be no declaration of a principle adverse to slavery. . . . It is a measure of war of a very questionable kind;" and he intimated that its object was not 'total and impartial freedom for the slave' but 'vengeance on the slave owner.'" Rhodes, *History of the United States*, IV, 357.

² Page 127.

³ *Annual Cyclopaedia*, 1863, subject "Louisiana," p. 594.

of the State, who freed his hundred and fifty slaves and conducted them within the Federal lines. Doubtless there were many other cases among loyal men who had been living in the exempted parishes.

The *de facto* status of the negroes within the Federal lines depended largely upon the attitude of the commanding general. We have seen that Butler made no deep scrutiny into the previous or present condition of servitude among those negroes that applied to him for service of any kind. He gave a particular welcome to those that had fled from rebel households; and as it was forbidden to return even those that fled from loyal masters, the condition of the ex-slave was one of practical freedom. A "rebel" who was in New Orleans at the time of its capture tells the writer that her slaves, as soon as they learned that the Federals were coming up the river, gave notice that they would work no longer. In 1864, however, slavery was still existent *de jure* within the Federal lines; but on the 8th of January of that year General Banks, upon his own responsibility, suspended all the laws concerning slavery existing in the old constitution or statutes of Louisiana. His explanation was that as the War Department had forbidden the return of fugitive slaves, and as the owners could not get them back without disturbing the public peace, the slavery laws could not be enforced; they were already a dead letter.¹

The effect of the proclamation in the thirty-five parishes controlled by the Confederates is a much less complicated matter to consider. Of course, for Confederates the proclamation had no validity whatever. They looked to Davis and not to Lincoln for proclamations. But to the two hundred thousand or more slaves left in these parishes the proclamation was naturally an invitation to steal away in the night-time if the Federal lines were distant, or to walk boldly away in the daytime if those lines were near. In a New Orleans paper of June, 1864, I have

¹ It has been shown in a previous chapter that the courts of New Orleans refused to hold valid Banks's suspension, but that the constitution of 1864 declared slavery abolished in all Louisiana.

found a letter written from Covington, Louisiana, by a mother to her son in the Confederate army. "Nearly every negro on this side of the Lake," she tells him, "has run away and gone to the Yankees." Caroline Merrick¹ gives a similar account of nearly all the plantations in the Atchafalaya district, where she was living during the Civil War. A former professor of Grand Coteau College relates in his memoirs that after the proclamation the slaves of that neighborhood kept quiet for a while; but when the Federal army passed by, many followed it to New Orleans, where one fifth of them died of privation and disease.² Freedom from bondage, a surcease of toil, and a more or less hearty welcome on the part of the deliverer naturally proved to be an attractive program to the slave.

A large number of the plantations, however, were not deserted by the negroes. Some of the most valuable slaves had been sent by their masters into Texas and Alabama.³ Many others remained on the plantations because they had always been well treated, and feared that if they decided to leave, their latter state would be worse than their former.⁴ Still others, who wished to go, were induced to stay by their masters, who told them that they could be free where they were; that it was not necessary for them to leave their homes, their children, and their household effects. Their freedom, it was explained to them, was assured, and they could expect wages from their old masters. Many planters did not follow this plan; but Mrs. Merrick says, "Our slaves remained on the place, and many of them and their descendants are still in the employ of the family." In the parishes far removed from Federal headquarters the news of the proclamation did not reach the negroes until long

¹ Merrick, *Old Times in Dixie Land*, pp. 51-53.

² *Memoirs of Rev. Father Widman*. MS., Jesuits' College, New Orleans.

³ Chase Correspondence, p. 399.

⁴ Miles Taylor testified that slaves left a great many plantations; and although his own place was within six miles of Donaldsonville, which was occupied by the Federals again and again, yet not one of over one hundred slaves ran away from him. Report on New Orleans Riots, p. 307.

after it had been issued. Their masters did not tell them of their freedom; for, among other reasons, they did not believe that Lincoln had a right to free them.

It has often been remarked that throughout the four years of terrible war there was no case of insurrection among the slaves, nor, in fact, any of those awful crimes for which the worst class of negroes are distinguished at the present day. This seems all the more praiseworthy when we remember that, in the great majority of cases, the master was far away on the battlefield while his family on the plantation was helpless amid a swarm of slaves. A southern paper, remarking on this noteworthy phenomenon, attributed it to the mildness and humanity of the master's rule in antebellum days.¹ While, however, an inhumane master was exceptional, there were a sufficient number of brutal overseers to create a feeling of revolt among the slaves in many parts of the South, and there had been at least two dangerous insurrections in the history of Louisiana. The absence of crimes against the whites should rather be attributed to the unconscious appeal which unprotected women and children made to a simple race made conservative by the long discipline of slavery, and more especially to the habit of obedience which subordination had instilled into every fibre of the slave's being. He looked upon the white race as occupying a place far above his sphere; no dream of social equality had come to distemper his brain.²

¹ Mobile Register quoted in New Orleans Times, June 23, 1865.

² Another view of the negro's good behavior during this period has been offered to the writer by the Rev. Dr. Tucker, of Baton Rouge, who has made a deep study of negro character during and since the war. He says that throughout the Southern States, in expectation of an uprising, patrols were kept ready to move to any threatened place. It was the fear of quick vengeance, he maintains, which kept the negro down. Carl Schurz says the great majority of the slaves stayed with their masters. He also speaks of the patrols which kept negroes from leaving the plantations. "Can the South Solve the Negro Problem," McClure's, January, 1904, pp. 260, 261. T. N. Page discusses this question, and says that it was a compliment to both races, and was due partly to the instinct of command possessed by southern whites and partly to the peaceful disposition of the negroes. He also says that in revolutionary times the British offered freedom to the slaves in Virginia and the Carolinas, and it had no effect, except to exasperate the masters. McClure's, March, 1904, p. 553.

Whatever may have been the reason, it is admitted that not only were there no uprisings against the whites, but there were a large number of cases in which the household slaves, or "family servants," showed a single-minded devotion and fidelity to their masters and their masters' families. Booker Washington was justified some years ago, when making an eloquent appeal in behalf of his race, in reminding a white audience of the faithful service which so many of that race performed in war times. Nor were the negro servants of Louisiana an exception. Many instances of devotion have been brought to the writer's attention. In one instance one of the slaves carried off his master's horses to Texas, and after keeping them there for two years brought them back in fine condition. A more interesting case is that of an old servant who, learning in the winter of 1903 that the present writer was seeking information about the conduct of the slave during the Civil War, wrote to his former mistress as follows: "I ask of you as a favor if you find any action of mine during those days worth mentioning, please do so. As I am getting old, and am bringing up a grandson, and trying to teach him how to get along in this world among all people, and especially the Southern people, who are our best friends, I would like to read something myself and have my grand-child to read something that his grandfather had done, even when he had the opportunity of being his own man." In answer to this appeal, his former mistress writes as follows: "Harry was bought in New Orleans when he was fully grown. He proved himself faithful; a trusted servant and friend, never having forfeited the confidence reposed in him. He served through the campaigns west of the Mississippi with Major W—— as body servant. He was frequently sent on important errands, which trust was never betrayed, though opportunity offered; and during the trying period after the war, when at times left as protector of the family, never wavered in his duty. As proof of Major ——'s attachment to him, he once risked his life to rescue him from drowning in Bayou

Vermillion, for which Harry always seemed to feel he owed a special debt of gratitude. He then began studying to educate himself, and afterwards located in Plaquemines Parish, from which he was sent as a representative to the legislature. An occasional letter informs us of his continued interest and affection for us, of his own welfare and prosperity, and the good will he has carried through life for our people." Governor H. W. Allen had a colored servant named Vallery¹ to whom he wrote in 1866 as follows: "I think of you very often, not only as my faithful servant in former days, but as my companion in arms, and on the battle-field. God bless you, Vallery. . . . If I am ever a rich man again, I will help you. . . . You were ever true to me, and I will never, never forget your services."

These instances of friendly, affectionate relations between master and servant—and they are only a few among hundreds—are worthy of remembrance as a pleasing contrast to the very hostile relations which Reconstruction was to produce. They serve also to show the falsity of the statements occasionally made by northern men in regard to the relations between the two races. Thus in the letters to Secretary Chase, so frequently quoted in these pages, Denison writes under date of October 8, 1864, that a law giving suffrage to negroes could not be sustained at that time in any State, county, or town throughout the whole South, and he then adds: "I do not think you appreciate or understand the intense antipathy with which Southerners regard negroes. It is the natural antipathy of races, developed and intensified by the servile, brutal condition of one—the insolent despotic position of the other. We used to hear much of the patriarchal character of the institution—of the fond attachment of the faithful slave—of the paternal and affectionate care of the kind master—and Southerners used to profess a liking for the negro, never exhibited in the North. This was all gammon. They liked the negro as I like my horse—a convenient beast of

¹ Dorsey, *Recollections of Allen*, p. 352.

burden for my use and pleasure. But that a negro should have a voice or influence in Government, or any rights which a white man is bound to respect—this is intolerable.”¹ While Denison is correct as to southern feeling at this time toward negro suffrage and social equality, he might have found the same sentiment wide-spread in the North. But his comparison of southern servants to “convenient beasts of burden” should be contrasted with the instances of genuine affection given in the foregoing pages.²

The proclamation of emancipation naturally increased rather than diminished the demoralization of the negroes within the Federal lines. The fittest of them, as we have seen, were enlisted for a while into negro companies; but thousands of them still wandered from plantation to plantation, or forced their way into the camps to be supported by their new friends. Here, while much sympathy and good will were expressed for them, they were found to be an intolerable burden. Such planters as were left in the lines were glad to employ them and pay them wages if they could thereby be certain of their continued services. In this new order of things they had the hearty cooperation of General Banks, who was pondering the question of how to manage the negroes on the abandoned and confiscated plantations which the government was trying to cultivate. The terms granted by the old masters varied on different plantations. Wages were from three dollars to ten dollars a month, and rewards and punishments were fixed for good and bad conduct respectively. The punishments were, first, fines, then the stocks, and lastly expulsion from the plantation. No negro was allowed to quit a plantation without a written license. If a hand left the place, or was expelled, his back wages were forfeited to the hospital

¹ Chase Correspondence, pp. 449-450.

² A Confederate veteran was lately heard to say: “If I live to get to the Confederate Reunion at New Orleans next month, I am going to propose a monument. It is to be of black marble and to be erected in honor of the ‘Confederate nigger.’” W. B. Hill, in Report of Conference of Southern Educational Association, 1903, p. 207.

funds, out of which the physicians and medicines were paid for. Stealing was punished by a fine of twice the value of the property stolen, one half to go to the hospital fund. Much to the relief of the commanding general these regulations seem to have drawn many negroes back to the plantations and to have resulted in a fair degree of success.¹

In the early part of the year 1864 Banks took up again the herculean task of dealing with the negro as a laborer. In January, as we have seen, on his own responsibility, he suspended (not abolished) all the laws concerning slavery. He followed this act, February 3, 1864, by a general labor order for all plantations, public or private, during the current year. It was more detailed and more stringent than any previous war regulation: it forbade the enlistment of soldiers from plantations until further orders; plantation hands were not allowed to pass from one place to another except under such rules as might be established by the provost marshal of the parish; flogging and other cruel or unusual punishments were forbidden; all questions between employer and employee were to be decided by the provost marshal; the possession of arms or concealed weapons without authority should be punished by fine and imprisonment; laborers should render to their employers, between daylight and dark, ten hours in summer and nine hours in winter of respectful, honest, faithful labor, and receive therefor, in addition to just treatment, healthy rations, comfortable clothing, quarters, fuel, medical attendance, instruction for children, and wages according to the following scale: (1) first-class hands, \$8 per month; (2) second-class hands, \$6 per month; (3) third-class hands, \$5 per month; (4) fourth-class hands, \$3 per month. Wages might be commuted for one fourteenth of the net proceeds of the crop. Indolence, insolence, disobedience of orders, and crime were to be suppressed by forfeiture of pay and such punishments as were provided for similar offences by army regulations. Laborers were to be allowed to choose their employers; but

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 594; Chase Correspondence, p. 377.

when the agreement was made, they were to be held to the engagement for the year under the protection of the government. In cases of attempted imposition by feigning sickness, or stubborn refusal of duty, employees were to be turned over to the provost marshal for labor upon public works, without pay. Arrangements were to be made by which hands could cultivate land on private account. A free-labor bank was to be established for safe deposits of the savings of the freedmen. As overseers, unlike the negro and the planter, had shown that they did not appreciate that anything new had occurred and still adhered to old customs, they were to be disciplined by reduced wages and mild punishments.¹ Labor was declared to be a public duty and vagrancy a crime. If, however, planters, without just reason, refused to cultivate, their estates should be temporarily forfeited to those that would.²

These regulations of General Banks were rigorous enough to bring order out of the existing chaos, and were condemned by northern philanthropists as oppressive of freedmen. It is said, however, that during the year 1864 some 15,000 plantations were worked with 50,000 freedmen. The Federal agent in charge reported that only on one per cent. of these plantations would the freedmen fail to get their full wages.³ The newspapers of that day, however, are full of the letters of planters discussing the momentous question of free labor. Banks expected wonders of free labor, and prophesied that in two years the product of the State would be quadrupled by the change from slave to free labor. It is needless to say that he did not understand the newly emancipated freedman. Life in the South was too easy, emancipation had been too sudden, for any immediate conversion of the slave into a strenuous free laborer. The planter, accustomed to compulsory labor, doubtless expected too much of his ex-slave; and the letters in the newspapers

¹ Annual Cyclopaedia, 1863, subject "Louisiana," p. 595.

² Times, 1864, passim.

³ Annual Cyclopaedia, 1865, subject "Louisiana," p. 515.

are full of the stealing, the neglect of work, and the mortality of the negro under the new conditions. Production fell off enormously. For the year 1861, for example, Terrebonne parish cultivated 80 plantations and produced 28,282 hogsheads of sugar, while in 1864 it cultivated 37 plantations and produced only 625 hogsheads. "Why do I not starve my hands into better behavior?" pathetically asks one planter, and then answers his own question: "Because a negro never starves where there is anything eatable to be obtained (by stealing)." In November, 1864, a meeting of planters was held of which Judge Joshua Baker, of Terrebonne, was elected chairman. This convention considered the labor question, and drew up regulations which, if accepted by the government, would have brought the freedmen again into bondage, in fact, if not in name; for they provided that insolence or contempt of superiors should be punished as "formerly." Obstinate cases were to be treated "with corporal punishment as in the army and navy of the United States."

In order to deal with the problem more thoroughly, Congress, on March 3, 1863, had authorized the secretary of the treasury, through his agents, to collect captured and abandoned property in the South.¹ In March, 1865, just about a month before the surrender of General Lee, a bureau for the relief of freedmen and refugees (called the "Freedmen's Bureau") was established under the control of the War Department. It was to continue during the rebellion and for one year thereafter. This bureau had full charge of all matters relating to freedmen, especially the distribution among them of lands abandoned by their owners or confiscated by the United States government. Forty acres might be given for a term of three years to each freedman, who was to pay an annual rent on the same or purchase it. In case of purchase he was to receive such title as the United States could confer. As soon as the war was over the operation of the bureau was extended to

¹ Peirce, *Freedmen's Bureau*, pp. 22-23.

the whole of Louisiana. Aided by missionary and religious societies of the North, it doubtless helped the negro in making provision for himself in his new state of freedom; but its officials were mostly indiscreet army officers—often bent on making their own fortunes—who managed the work of the bureau in such an inefficient manner that the planters, especially those coming home from the war, found the bureau an intolerable nuisance, and longed to be rid of it. The planters complained of the bureau; the bureau complained of the planters; and the freedmen complained of both. It was confusion worse confounded.

It is not surprising that such a bureau was not conspicuously successful in this conflict of ignorance, passion, and self-interest, for the freedmen believed that as the Federal Congress had passed the thirteenth amendment setting them free, it was going to despoil their old masters of all their property and divide it among the ex-slaves as a Christmas gift. They dreamed already of riding in the white folks' carriages, and of enjoying a kind of saturnalia of freedom. "Where is de government, de forty acres of land and de mule?" they began to cry. In vain the agents of the bureau informed them that the government had no intention of giving gratuitously. Many of the freedmen would not believe that the war had been waged only to set them free. As to the Confederate planter returning from the war, they did not trust him at all; contracts with him might mean a renewal of slavery. "Shall I sign dat ar paper dat I can't read?" one old darky near Shreveport was heard to say; "I'm afraid it will bring me back to slavery." The planters, on the other hand, desperate at the thought of their crops not being gathered, and exasperated by the not unnatural attitude of their ex-slaves, sometimes resorted to extreme or unlawful measures to control them. The Shreveport Gazette of July, 1865, regrets that one or two persons in the vicinity have inflicted on some of their former slaves punishment which the law no longer regarded as excusable. Some planters drove away the helpless aged

and infirm negroes, and promptly received orders from the bureau that they must take them back and make such contracts as would enable such persons to be properly supported. The town of Opelousas (and there were others) passed an ordinance that no negro or freedman should be allowed to rent or keep a house in the town, and that none should reside in the town who was not in the regular service of some white person or former owner; nor should any freedman barter, sell, or exchange within the town without a permit.¹ Last, but not least, in July, 1865, a negro at Shreveport brought in a paper which read as follows: "This boy Calvin has permit to hire to whom he pleases, but I shall hold him as my property until set free by Congress. Signed, E. V. Tully." It is needless to say that the Opelousas ordinance was abolished by the Freedmen's Bureau, while both it and the slave permit were forwarded to Washington by Carl Schurz, special agent of the president, who reported that some Louisiana planters refused to accept the proclamation of emancipation as valid in times of peace, while others wished to establish a system of peonage.

The thousands of destitute freedmen who came into the Federal lines were to be cared for and furnished with employment. To meet the difficulties of the situation the Bureau of Free Labor under Superintendent Conway established what were termed "home colonies." Of these there were four in Louisiana: the McHatton at Baton Rouge, the Rost and McCutcheon in St. Charles parish, the General Bragg in Lafourche parish, and the Sparks in Jefferson parish. The number of acres included in the "home colonies" was 9650. The number of dependents placed in them was 1902, of whom 609 were sick. The colonies were organized with a superintendent, a physician, a cultivator of land, and a clerk. On each were a school and, "where parties so desired," churches. The govern-

¹ Schurz's Report to President Johnson, 39th Cong., 1st sess., S. Ex. Doc. No. 2, p. 23.

ment was to receive one third of the crops on the lands cultivated.¹

In March, 1865, General Hurlbut issued a general labor order which provided for the continuance of the home colonies and for the enforcement of all fair contracts through the military authorities and the superintendent of the bureau. No cruelty, inhumanity, or neglect of duty was to be allowed on the part of employers. Wages for time lost by sickness were to be deducted, and both wages and rations where sickness was feigned for the purpose of idleness. In cases of feigned sickness or refusal to work according to contract the offender was to be reported by the provost marshal to the superintendent and put at forced labor on the public works without pay.

Very interesting information as to the condition of the freedmen from the Republican standpoint is to be found in the final report of the Bureau of Free Labor, Department of the Gulf,² prior to its transfer to the "Bureau of Refugees, Freedmen, and Abandoned Lands," over which Major-General O. O. Howard presided. This report contains an account of the management of the Bureau of Free Labor up to July 1, 1865. The superintendent complains that the press of the State is almost universally opposed to the continuance of this bureau, and that there are bad men who have come from the free States who care nothing for humanity or religion, and "who are as ready to whip the freedmen, provided it will bring them gain, as they are to condemn the same conduct on the part of the men who formerly owned the freedmen." In accordance with the

¹ General Fullerton, who succeeded Conway, declared that he found these colonies "managed so miserably that he consolidated the four into one." Banks had established a board of education for freedmen, which met with some success. He was also the pioneer in laying a regular tax on the southern people for support of public schools. Peirce, *Freedmen's Bureau*, p. 20. J. T. Sprague, assistant commissioner for Florida, says that the colony in that State stole all the hogs and cattle in the neighborhood, and that the colonists would not work. Fleming, *Documentary History of Reconstruction*, I, 348.

² This is the report of Superintendent Thomas W. Conway, printed at New Orleans, 1865. In the collection of Gaspar Cusachs, Esq.

law of Congress of March 3, 1865, the superintendent says he is prepared to lease the abandoned and confiscated lands of Louisiana to freedmen and loyal refugees in lots of forty acres each, and some plantations have been already so leased. In conclusion, the superintendent declares that the people of the South have some noble qualities; but they are not yet fitted to be trusted with the defence of the liberty of the freedmen. He therefore recommends "that the work of the bureau be continued for three or four years, by which time the freedmen, having acquired lands and the suffrage, will be able to take care of themselves. If the freedmen are not protected in the liberty proclaimed to them, they will go away from the country, trusting to God."

In spite of the efforts of the bureau, which was not able to cope with the situation, there was a general demoralization of labor, which is reflected in the newspapers of the day. A planter in Terrebonne writes that "laborers are allowed to disregard agreements with the planters. The provost marshal says he has no adequate force to stop the evil. Our people are in great distress and want, from the fact that they made no crop last year, and will make nothing this year—and the tax collector knocking at the door and the levees broken down." A New Englander writes to the *Times* that he has come to Louisiana and hired a plantation of a thousand acres. He came South with the opinion that the negro was a much abused race, but of his lot of hogs, chickens, etc., nearly all had been stolen by his "hands."

It was but natural, therefore, that the planters, facing ruin, with the levees in a wretched condition and the crops ungarnered, should turn to the legislature for relief, as was done in a number of other Southern States when the war was over. The Freedmen's Bureau was regarded both as a failure and as an unwelcome agent between employer and employee. Accordingly, in September, 1865, the National Conservative Union men of Louisiana, in an address to the public, urged that "representatives to the General Assembly should be selected who favored the enactment of such laws

for the regulation of labor as would induce the general government to relieve the State of that terrible incubus, the Freedmen's Bureau."

When the legislature met in extra session on November 23, 1865, it took up, as the governor had suggested in his proclamation, the all-important labor question. Blaine declares that among the Southern States which passed stringent labor laws at this time Louisiana perhaps "attained the worst eminence." "At the very moment," he says, "when the Thirty-ninth Congress was assembling [December, 1865] to consider the condition of the Southern States and the whole subject of their reconstruction, it was found that a bill was pending in the Legislature of Louisiana providing that 'every adult freed man or woman *shall furnish themselves with a comfortable home and visible means of support within twenty days after the passage of this Act,*' and that 'any freed man or woman failing to obtain a home and support as thus provided shall be immediately arrested by any sheriff or constable in any parish, or by the police officer in any city or town in said parish where said freed-man may be, and by them delivered to the Recorder of the parish, and by him hired out, by public advertisement, to some citizen, being the highest bidder, for the remainder of the year.' And in case the laborer should leave his employer's service without his consent, 'he shall be arrested and assigned to labor on some public works without compensation until his employer reclaims him.' The laborers were not to be allowed to keep any live-stock, and all time spent from home without leave was to be charged against them at the rate of two dollars per day, and worked out at that rate."

"By a previous law," continues Blaine, "Louisiana had provided that all agricultural laborers should be compelled to 'make contracts for labor during the first ten days of January for the entire year.' With a demonstrative show of justice it was provided that 'wages due shall be a lien on the crop, one half to be paid at times agreed by the

parties, the other half to be retained until the completion of the contract; but in case of sickness of the laborer, wages for the time shall be deducted, and where the sickness is supposed to be feigned for the purpose of idleness, double the amount shall be deducted; and should the refusal to work extend beyond three days, the negro shall be forced to labor on roads, levees, and public works without pay.' The master was permitted to make deductions from the laborer's wages for 'injuries done to animals or agricultural implements committed to his care, or for bad or negligent work,' he, of course, being the judge. 'For every act of disobedience a fine of one dollar shall be imposed upon the laborer'; and among the cases deemed to be disobedience were 'impudence, swearing, or using indecent language in the presence of the employer, his family, or his agent, or quarreling or fighting among one another.'"¹

Upon these two sets of laws—the pending bill of December, 1865, and "the previous law for agricultural laborers"—Blaine naturally passes some severe strictures, maintaining that they violated the spirit, if not the letter, of the thirteenth amendment, which was ratified by this same legislature. Moreover, in the Congress that met in December, 1865, Senator Wilson of Massachusetts recited this same "pending bill" of the Louisiana legislature, and introduced a bill providing for the nullification of such peonage laws.² It is a noteworthy fact, however, that neither of the bills mentioned by Blaine ever became law in Louisiana. No such statutes appear in the acts of the legislature. An examination of the journals of the two houses shows that "the pending bill" was never voted upon, nor even recorded in the minutes.³ The agricultural labor bill, however, introduced by Duncan F. Kenner, did pass both houses, but it was either never submitted to the governor or was pocket-vetoed by him. The surviving members of the legislature

¹ Blaine, *Twenty Years*, II, 101, 102.

² *Congressional Globe*, 39th Cong., 1st sess., p. 39.

³ It appears in the radical organ, the *New Orleans Tribune*, of December, 1865, but was doubtless lost in committee.

cannot recall what was the fate of this bill. It is very probable that, after passing both houses, it was suppressed on account of the commotion which it created when recited by Senator Wilson in Congress. Any odium that attaches to it, of course, rests upon the legislature that passed it.

Another law, however, which passed both houses, was approved by the governor, and was duly promulgated (December 20, 1865), excited much adverse criticism in Congress, and was exploited by the radicals within and without that body. This was the vagrant law, similar in character to existing laws in Northern States and to the vagrant laws passed by other Southern States at this time. This law adopted as a description of vagrant a definition to be found in the acts of 1855, as follows: "All idle persons who, not having visible means to maintain themselves, live without employment; all persons wandering abroad and lodging in groceries, taverns, beer-houses, market-places, sheds, barns, uninhabited buildings, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages, or other public places, to beg or receive alms; habitual drunkards who shall abandon, neglect or refuse to aid in the support of their families, and who may be complained of by their families, shall be deemed vagrants."¹ Adopting this definition, the law provides:

That upon complaint made on oath before a justice of the peace, mayor, or judge of the district court, or other proper officer, that any person is a vagrant within the description aforesaid, it shall be the duty of such justice, judge, mayor, or other officer, to issue his warrant to any sheriff, constable, policeman, or other peace officer, commanding him to arrest the party accused and bring him before such justice of the peace or other officer; and if the justice or other officer be satisfied by the confession of the offender, or by competent testimony, that he is a vagrant within the said description, he shall make a certificate of the same, which shall be filed with the clerk of the court of the parish, and in the city of New Orleans the certificate shall be filed in the office of one of the recorders; and the said justice or other officer shall require the party accused to enter into bond, payable to the Governor of Louisiana, or his

¹ Acts of Legislature, 1855, p. 149.

successors in office, in such sums as said justice or other officer shall prescribe, with security to be approved by said officer, for his good behavior and future industry, for the period of one year; and upon his failing or refusing to give such bond and security, the justice or other officer shall issue his warrant to the sheriff or other officer, directing him to detain and to hire out such vagrant for a period not exceeding twelve months, or to cause him to labor on the public works, roads and levees, under such regulations as shall be made by the municipal authorities;

Provided, That if the accused be a person who has abandoned his employer, before his contract expired, the preference shall be given to such employer of hiring the accused; and provided further, that in the city of New Orleans the accused may be committed to the workhouse for a time not exceeding six months, there to be kept at hard labor, or to be made to labor upon the public works, roads or levees. The proceeds of hire in the cases herein provided for, to be paid into the parish treasury for the benefit of paupers; and provided further, that the person hiring such vagrant shall be compelled to furnish such clothing, food and medical attention as they furnish their other laborers.¹

It will be noticed that this vagrant law makes no discrimination of race, color, or previous condition of servitude. In this respect it was different from the law enacted about the same time in Mississippi, which declared that "all free-men, free negroes, and mulattoes in the State, over the age of eighteen years, found on the second Monday of January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling together either in the day or night time, together with all white persons so assembling with them on terms of equality, or living in adultery or fornication with negro women, should be deemed vagrants." It was also shown at a later time that the Louisiana law was practically a copy of the Massachusetts vagrant law and that similar laws existed in Connecticut, New York, Maine, and other States of the North,² and that it was approved in Louisiana by a governor who had voluntarily emancipated his slaves and was a consistent Union man. Such laws, it was argued, were absolutely necessary in the South where emancipation had flooded the country with idle and possibly criminal freedmen; they were applicable to whites as well as to blacks.³ Nothing, how-

¹ Acts of Legislature, extra session, 1865, p. 18.

² For these laws see Garner, *Reconstruction in Mississippi*, p. 119, note.

³ These laws were repealed by the constitution of 1868.

ever, could still the outcry of the northern radicals against what they deemed a return to slavery. It was plausibly argued by the opponents of the South that, while in the North such laws could be enforced with wisdom and impartiality, the same laws in the South at this time would be enforced so as to discriminate against the ex-slaves, at whom the laws were really directed. The only result would be a practical return to slavery, especially when the negroes were denied that weapon of defense, the suffrage.

Surely the legislators of the South must have been blind to their best interests to suppose that Congress would permit such a return to the old régime.¹ Were they "Bourbons that learned nothing and forgot nothing?" Yet the writer has been assured by a member of the legislature of 1865 that this body never doubted that Congress would approve the vagrant law of this State, which appeared so clearly necessitated by the existing status of the freedman. It was not perceived by the members that in attempting to rid the State of the Freedmen's Bureau by legislating on the labor question they were really insuring the continuance of that incubus. So strong was the belief in the legislature that President Johnson would be able to carry out his policy in spite of the factious opposition of the radicals that no fears seem to have been felt for the future.

There was, however, in New Orleans at this time a very dangerous organ of opposition, which the conservatives rashly concluded to ignore. This was the New Orleans Tribune, an exponent of universal suffrage, vigorously edited in the interest of the negroes. This journal, a copy of which was sent to every member of Congress, carried on a relentless war upon the legislature. It printed every labor law proposed or passed by that body, and appealed

¹ The Chicago Tribune, of December 1, 1865, said, relative to the Mississippi laws, "We tell the white men of Mississippi that the men of the North will convert the state of Mississippi into a frog pond before they will allow any such laws to disgrace one foot of the soil in which the bones of our soldiers sleep and over which the flag of freedom waves." Quoted by Garner, *Reconstruction in Mississippi*, p. 115, note 3.

to the friends of the freedmen in the North and in Europe to say whether there was any free labor in Louisiana. It ridiculed the legislature for its attempts to pass labor laws which were promptly nullified by the counter regulations of the Freedmen's Bureau.¹ When the bureau recommended yearly contracts for labor, the Tribune declared that the freedmen should demand their wages every week, and that any kind of labor contract was disguised slavery. It maintained that wherever the Federal troops were withdrawn, persecution of the freedmen and of the loyalists either had followed or would follow. Alleged instances of this persecution in the country parishes were given. The only safety for the freedman was in the bestowal of the ballot. It urged upon Congress the rejection of southern representatives, and declared that if they were rejected "Mr. James Madison Trickster" (Wells) would soon "turn up as good a republican as of yore"²—a prophecy which was to be fulfilled exactly. It proclaimed to Congress that persecution of the negro was the dominant note of the legislature as well as of the planters. The influence of the Tribune at Washington, seconded by Warmoth and other disgruntled radicals, was immense. Its columns supplied the radical orators with the thunder which they launched against "the vicious legislation of Louisiana."

Before the adjournment of this special session (December 22), a bill was offered in the senate by DuVigneaud to define the civil status of the freedman: "The freedman was to have the same rights and privileges as were enjoyed by the free colored population previous to the Civil War; that they should be heard as witnesses in all the Courts of the State, and should sue and be sued in all the courts." This bill, however, having passed its first reading in the senate two days before adjournment, was dropped amid the pressure of

¹ The New Orleans Tribune of December 20, 1865, states that on the very day the legislature tried to regulate the relations between laborers and employers the bureau issued an order which reduced the regulation to nothing before it saw the light of day.

² New Orleans Tribune, December 20, 1865.

business at the close. It would have given the freedman every right except the suffrage. While, however, no law was passed granting rights and privileges to the freedman,¹ it was generally understood that, having been emancipated, he was thereby placed on the same footing as the free man of color. In fact, General Fullerton, a wise and sane superintendent, who succeeded Conway as agent of the Freedmen's Bureau, in making his report during the latter part of 1865² said that as all free persons under the new constitution as well as under the old code were admitted to the state courts, he had abolished the freedmen's courts and transferred the pending cases to the civil courts of the State.³

Yet, as we have seen, the laws actually promulgated by the legislature made no discrimination against the negro except in the matter of suffrage. In this cautious wording

¹ The Annual Cyclopaedia of 1865, page 514, says that the status of the negro was fixed at this session, but this statement is an error. It is true that at the regular session of this legislature in 1866 the same bill was taken up and approved by both houses, but it was not submitted to the governor, and hence it did not become a law. A committee of the senate reported on February 22, 1866, that such a law was unnecessary "in view of the humane provisions of the law of Louisiana which existed long anterior to the late war, and which extends to all free persons alike the right to hold property, testify in courts, acquire education, etc., in a word, the guarantees of law for life, liberty, and pursuit of happiness. In these respects, the laws of Louisiana are and have always been different and exceptional among those of other States, and these provisions apply as well to the recently emancipated as to any other class of free colored persons."

² New York Times, December 31, 1865.

³ Whereupon the New Orleans Tribune, the organ of the negroes, declared that the confidence of the people of color had been terribly shaken in the bureau "since the delivery of the whole machinery into the hands of the rebels." December 14, 1865. Fullerton was disliked by the Tribune because he advocated Johnson's policy of reconstruction. Fullerton favored the contract system, and predicted that in five years, if no new element of discord intervened, the negroes would be as prosperous as any one could desire. It is noteworthy that he did not suggest the advisability of entrusting the ballot to negroes. One of the New Orleans papers, however, urged the legislature to deny the ballot to ignorant and incompetent whites and thus forestall any blame for not granting it to freedmen. This sound advice was unfortunately ignored. Even if there had been a wish to accept it, the framing of such a law would have presented many difficulties.

of statutes Louisiana differed from most of the other Southern States. In Mississippi, for example, the old penal laws applying to slaves were practically reenacted against the freedmen; and it was provided that "no freedman could rent or lease lands except in incorporated towns or cities" where the corporate authorities were empowered to control their privilege.¹ While the Louisiana legislature did not deserve the odium attached to such laws by the North, it did not fail to put on record its belief that it lay with the State to determine the political and civil relations of the ex-slaves. Accordingly, in readopting the thirteenth amendment to the Federal Constitution, the legislature added a clause declaring "that any attempt on the part of Congress to legislate otherwise [than is necessary for the prevention of slavery] upon the political *status* or civil relations of former slaves within any State, would be a violation of the Constitution of the United States."²

¹ Garner, *Reconstruction in Mississippi*, pp. 114-115.

² *Annual Cyclopaedia*, 1865, subject "Louisiana," p. 515.

CHAPTER VII.

THE SO-CALLED RIOT OF JULY 30, 1866.

The culminating point in the struggle between the Democrats and the radicals in Louisiana was the so-called riot of July 30, 1866. This important event in the history of Reconstruction, which gave the quietus to the constitution of 1864 and was a proximate cause of the severity of the reconstruction measures adopted by Congress in 1867, may best be understood by the consideration of three questions: (1) What was the attitude of the legislature of Louisiana toward the freedmen and the white radicals in the first half of the year 1866? (2) What was the attitude of Congress toward the South? (3) What was the attitude of the radicals in Louisiana toward the freedmen and the Democrats during the same period?

In answer to the first question it is to be noted that the harmony existing between the legislature and Governor Wells in the autumn of 1865 could not in the nature of things last indefinitely. Wells had hoped that Louisiana, as reconstructed by Lincoln and Johnson, would be readmitted by the Thirty-ninth Congress. He was disappointed. For some months he seems to have hoped that Johnson would be able to score a success over Congress; but when in the spring of 1866 all hope of this seemed to have vanished, Wells prepared to go over to the opposition. On the other hand, the Democrats, who dominated the legislature, had accepted Wells as governor because he seemed the most available candidate to meet the demands of President Johnson. His intense Unionism during the war, however, naturally prevented him from being persona grata to the mass of ex-Confederates. Moreover, many of his appointees to office had proved unsatisfactory. They were

not radicals; but they were, for the most part, Unionists, and the legislature was now determined to restore the State to the control of the old office-holders. Far from conceding any share in the government to the freedmen and the radicals, the legislature felt itself strong enough to evict Unionists and to demand the restoration of pure democracy as represented by ex-Confederates. Wells was naturally opposed to the eviction of his appointees.

Accordingly, when the legislature, declaring that the present holders of offices were merely appointees, voted that new elections should be held in March for both municipal and parish offices, the governor vetoed the two bills embodying these provisions on the ground that one of them did not allow the usual time for a proclamation, and that a modification of the charter was necessary for a fair election, while the other was equally objectionable from a constitutional standpoint. The legislature, regarding these objections as trivial, promptly passed the bills over the veto, and then proceeded to make some concessions to the governor's views by making changes in the city charter and by deferring the parish elections until the month of May. Thereupon the governor, making the best of a situation which must have been very unsatisfactory to him, issued the necessary proclamations.¹ The *Daily Crescent* stated that the disagreement between the governor and the legislature was "due to a desperate attempt of interested and unpopular officials to hold on to the emoluments of office in utter defiance of an overwhelming public opinion."

The city election for mayor, comptroller, aldermen, and other city officials was held March 12, in accordance with the strict election laws in force in the autumn of 1865. This law provided that only male whites, twenty-one years of age, who were citizens of the United States and resident in the State for one year preceding the election, and who showed that they came under the provisions of the amnesty oath, should be allowed to vote. It seems to have been

¹ *New Orleans Daily Crescent*, March, 1866, *passim*.

agreed that there should be no deep scrutiny into the qualifications of Democratic voters.¹ The radicals, recognizing their weakness in the absence of negro suffrage, did not take part in the election, and the Democrats carried all the polls except in the case of a few aldermen elected by the National Unionists. The mayor-elect, John T. Monroe, and one of the aldermen, J. O. Nixon, were promptly suspended from the exercise of their functions by the commander of the department, General E. R. S. Canby, on the ground that they were not qualified under the oath of amnesty. Monroe, it was maintained, had "uttered rebellious language after the City had been captured, and had refused the oath of allegiance." However, a special pardon was obtained from President Johnson, the order of suspension was revoked, and on May 15 Mayor Monroe entered upon his duties.² The parish elections were duly held on the first Monday in May. The state government, as reorganized by the Democrats, was now in full operation.

Another matter of importance considered by the legislature was the advisability of calling a convention to frame a new constitution for the State. There was much difference of opinion. Some members argued that it was unwise to agitate the question at this time, while others held that it was the duty of the legislature to provide for the framing of a new constitution, as that of 1864 had not been adopted by the majority of people in the State. Finally, it was proposed to submit the question to the people at the election to be held in May. But before this proposal was finally adopted, despatches were received from W. B. Egan, D. S. Cage, and J. B. Eustis, who had been sent to Washington to consult President Johnson in regard to the future of Louisiana. They reported that, after several agreeable interviews with the president and the secretary of state, they had become convinced that further agitation of the convention question would embarrass the president's policy of

¹ Annual Cyclopaedia, 1866, subject "Louisiana," p. 448.

² Mayor Kennedy protested against him. Report on New Orleans Riots, testimony, p. 518.

reconstruction, a policy which he (the president) was confident of bringing to a successful conclusion. Whereupon the legislature laid the bill on the table.¹ The *True Delta*,² commenting on these proceedings, said that the president's refusal to allow a new convention to be called showed that he approved of the policy of Governor Wells, and that the latter was evidently actuated by good motives.³

The second question which must be considered in order to gain a complete understanding of the New Orleans riots is the attitude of Congress toward the South. The *New Orleans Crescent* of March 1 announced: "War is now on between the radicals in Congress and President Johnson." In fact the situation had been becoming more and more strained ever since Congress met in December, 1865. The mild policy of the president was unpopular, and that body had the necessary two-thirds majority to override his veto.

The cause of the South, which the president advocated, was extremely weak for several reasons. These may be briefly stated as follows: (1) The Confederate States during the war had assumed the position of having withdrawn absolutely from the Union by action of the several States. Hence they could not admit that Lincoln and Johnson were right in regarding secession as a mere rebellion of individuals; hence they were estopped as secessionists from rejecting the radical platform that the rebellious States were out of the Union, and that Congress could prescribe measures for the readmission of their representatives. (2) Southern legislatures had in no case granted the suffrage to the negro. It would have been a remarkable concession if they had done so; but their refusal enabled the radicals to say that the three-fifths rule having been abolished, the South would be more largely represented in Congress than before the emancipation (which was true), and that southern Demo-

¹ *Journal of House of Representatives*, 1865, pp. 97-98. *True Delta*, March 10, 1866.

² The files of the radical organ, the *New Orleans Tribune*, for this period are unfortunately missing in the city archives.

³ Wells says that Johnson telegraphed to him for his view, and that he opposed it. *Report on New Orleans Riots*, testimony, p. 439.

crats and northern Democrats could combine in Congress to control the destinies of the country (which was at best very doubtful). (3) Some of the Southern States had passed laws denying civil rights to the negro and discriminating against him in the holding of land, etc. (4) There was undue haste on the part of the South to send to Congress "ex-rebels." Alexander H. Stephens, vice-president of the Confederate States, was released from a Federal prison on October 11, 1865, and was elected United States senator in February, 1866. The reception of such men could not be cordial. It may be added that the cause of Louisiana was peculiarly weak because the constitution of 1864, which was recognized by Johnson and on which the State sought readmission, was not regarded as valid by the Democrats who had been elected under its provisions. These Democrats were willing to accept Sumner's lurid description of it. The recognition of such a constitution by the president was a serious handicap, both to the success of the president's general policy and to the reconstruction of Louisiana itself.

Nevertheless, there was in Congress much diversity of opinion, and the cause of the South found stronger defenders among northern and western Democrats than she herself could have furnished, for these defenders were able to urge that all acts of secession had been constitutionally null and void, and that a speedy recognition of the southern governments would be the proper confirmation of this fact—a plea which the South itself was unable to set up, but which the radicals could not logically reject. On many other points, also, there was so great a diversity of opinion that it is in some cases difficult to discover what was the attitude of Congress. Amid this clash of opposing views it was not unnatural for the South to hope that the policy of the president might still prevail. The principal questions discussed were three: (1) Had the president the constitutional right to recognize state governments in the rebellious States without the consent of Congress? (2) Were the rebellious States within or without the Union? (3) Should

these States be forced to give the suffrage to the negroes before their representatives were received by Congress?

As to the first question, it will be remembered that in 1863 President Lincoln, relying upon that provision of the Constitution which declares that the president "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," granted a full pardon to all who had participated in the rebellion (except certain specified classes) who would take an oath of allegiance. But the president went further, declaring that when a small percentage of the voters, having taken the oath, should establish a state government which should be republican, such should be recognized as the true government of the State, and the State should receive thereunder the benefit of the constitutional provision which declares that "the United States shall guarantee to every State in this Union a republican form of government," the admission of representatives, however, resting with Congress. It will be remembered that, at the time, this proclamation seemed to some radicals an encroachment upon the powers of Congress; at least Congress, it was argued, ought to have a voice in establishing a "republican government." The successor of Lincoln did not need much persuasion to be convinced that this power of recognition rested with the executive, and he acted accordingly in the cases of Louisiana, Arkansas, and Tennessee. When the Thirty-ninth Congress met in December, 1865, it was argued by Representative Howard, of Michigan, that the president had no right, without the consent of Congress, to recognize a government in a State which was in insurrection against the United States; but this view was modified in the majority report of the famous committee of fifteen (June, 1866). This report, signed by Fessenden, Stevens, Conkling, and others, said that the president might recognize the people of any State as having resumed relations of loyalty to the Union and act in his military capacity on this hypothesis. He might properly permit the people to assemble, to initiate local governments,

and to execute local laws. But it was not for him to decide upon the nature or effect of any system of government which the people of these States might see fit to adopt; this power rested with Congress.¹ In spite of an able argument contained in a minority report,² this theory, that the proclamations of the president in war times were merely provisional permission to do certain acts, the validity of which must be determined by the constitutional government, was accepted by Congress as a substitute for Johnson's policy.

The second question as to whether the rebel States were within or without the Union, a question which Lincoln had dismissed as an unprofitable abstraction, was taken up and discussed anew. It was held by some that these States must still be in the Union; otherwise the president himself, being from Tennessee, was a public enemy. Moreover, throughout the war, in the laying of direct taxes, in the establishment of Federal courts, in submitting the thirteenth amendment, they had been treated as within the Union. At the previous session of Congress, Senator Doolittle, of Wisconsin, had said, "In my opinion the doctrine that these States are no longer States of the United States is one huge, infernal, constitutional lie, that would stamp all our conduct from the beginning as murder, and cover us all with blood." In December, 1865, Stevens, ignoring the action of the Federal Congress toward the States which had seceded, declared that, by the law of nations, the late war between the two acknowledged belligerents severed the original contract and broke all the ties that bound them together. It was, therefore, the right of the victorious party to treat them as a conquered belligerent, severed from the Union in fact. Stevens evidently intended to annex the territory of these conquered belligerents. "Since the conquest," he said, "they have been governed by martial law. Military rule is

¹ Report of Joint Committee on Reconstruction, 39th Cong., 1st sess., H. Rept. No. 30, p. viii.

² Signed by Reverdy Johnson, Rogers, and Grider. Annual Cyclopaedia, 1866, subject "Public Documents," pp. 650-657.

necessarily despotic, and ought not to exist longer than is absolutely necessary. As there are no symptoms that the people of these provinces will be prepared to participate in constitutional government for some years, I know of no arrangement so proper for them as territorial governments."¹ As early as 1863 Charles Sumner had maintained that the seceding States had committed political suicide, in other words, they had ceased to be "constitutional States." Finally, the majority report of the committee of fifteen (and this was signed by Stevens) said that the so-called Confederate States, "having by treasonable withdrawal from Congress and by flagrant rebellion and war, forfeited all civil and political rights and privileges under the Federal Constitution, could only be restored thereto by the permission and authority of that constitutional power against which they rebelled, and by which they were subdued." No representation of these States was to be allowed until they had made such changes in their organic law as should determine the civil rights and privileges of all citizens in all parts of the republic, should place representation on an equitable basis, should fix a stigma on treason, and repudiate claims for expenses of the rebellion and loss of slaves.² This last theory, generally termed the "congressional theory," was practically embodied in the fourteenth amendment. It is sometimes called the theory of "forfeited rights." As contrasted with Sumner's view, it might be termed the theory of "suspended animation." The reader must decide for himself which theory was correct: the "Doolittle," the "conquered territory," the "suicide," or the "suspended animation theory." Perhaps the first three will be found not to differ from one another essentially. Under any one of them Congress could naturally and constitutionally claim the right of guaranteeing "a republican form

¹ Cox, *Three Decades*, p. 371. Cox argued against Stevens's view, saying that there was no authority under the Constitution to hold conquered territory as a province, a view which sounds old-fashioned in 1904.

² Report on Reconstruction, p. xxi.

of government" and of providing for the admission of representatives. Such a right did not rest with the president alone. The only question was what should be regarded as "a republican form of government." There was great danger that it would be interpreted by the dominant party as a form of government which would keep in power the Republican party.

The third question as to excluding the rebellious States until suffrage was granted to the negro raised much discussion. Reverdy Johnson argued that if large numbers of negroes were transferred to Massachusetts, that State would exclude them from the suffrage. But Sumner declared: "If negroes had been allowed to vote, there would have been no Secession; if he votes now, there will be peace; without this, you must have a standing army. The ballot box, or the cartridge box—choose ye between them." Hendricks, of Indiana (Democrat), reproached Sumner for trying to establish the ascendancy of the Republican party "regardless of everything;" but the radicals maintained that the freedman in the South must have the ballot because he had shed his blood in the Civil War, and because it would protect his liberty against the old slave-owners.

If the suffrage of the negro sustained the ascendancy of the Republican party, it was, after all, this party which had preserved the Union and abolished slavery. Stevens's sympathy with the freedman went further. Not only must he have the ballot, but the Federal government, by confiscation of southern lands, must grant him fifty acres and a hut. "Unless we give him this," cried Stevens, "we shall receive the censure of mankind, and the curse of Heaven." Finally, on June 13, 1866, Congress passed by joint resolution the fourteenth amendment to the Constitution. It was not so radical as Stevens would have liked to see it, but he voted for it. It made the negro a citizen; forbade the denial of "privileges and immunities;" settled representation on the new basis; denied the right to hold office to certain rebels; declared the validity of the national debt; and while it did

not confer the suffrage on the freedman,¹ it placed a penalty on its denial. Though President Johnson, in his message of June 22, doubted the propriety of passing and submitting such an amendment when eleven States were excluded from Congress, it was duly submitted to the governor of each State by Secretary Seward.² It was understood that if a "rebel" State ratified this amendment, its representatives would be received by Congress.³ It was promptly ratified by Tennessee, and in July the representatives of this State were admitted by Congress. When the amendment reached the governor of Louisiana, the legislature was no longer in session, and neither radicals nor conservatives were sufficiently enthusiastic in behalf of the amendment to wish to see an extra session called.⁴

In fact, as far as the radicals were concerned, they had other plans. As these plans form the third question which must be understood before considering the New Orleans riots, let us see what they were.

In the spring of 1866 some thirty or more of the conventionists of 1864, now leaning toward the most radical doctrines, had become so much exasperated at seeing the offices of the State passing into the hands of ex-rebels that they began to meet and to discuss plans for the ousting of the "ins" and for obtaining the recognition of the Federal government in behalf of Unionists. They were much encouraged in this scheme by the attitude of the existing Congress toward the question of reconstruction. At first it was proposed to meet and call a convention to frame a new con-

¹ The minority report of the committee of fifteen says that the suffrage was not directly conferred on the negro, for this measure would have been obnoxious to Northern and Western States, and would have prevented them from ratifying the amendment. *Annual Cyclopaedia*, 1886, p. 654; *Report on Reconstruction*, pt. ii, p. 9.

² An amendment, when passed by Congress, does not require the signature of the president. 3 Dallas, 378.

³ Burgess says that the president did not view the amendment with favor while it was pending, and it soon became manifest that he was advising its rejection by the States. *Reconstruction and the Constitution*, p. 80.

⁴ The *Times*, June 27, 1866, objects to the fourteenth amendment because eleven States were excluded.

stitution for "the territory of Louisiana." Such a convention, it was true, might meet with violence at the hands of the ex-rebels; but this result would only show Congress that the president's policy had been a failure, and that rebellion was still rampant in the South. Sober second thought, however, suggested that the admission of a territory would require the signature of the president. This would be refused, of course, and a two-thirds majority for such a purpose might be difficult to obtain.

A simpler method of procedure was to reconvoke the convention of 1864 and to revise the constitution of that year in accordance with radical views, that is, suffrage to the negroes, and a denial of it to ex-rebels. It will be remembered that before the convention of 1864 adjourned it passed a resolution declaring that, "when this Convention adjourns, it shall be at the call of the president, whose duty it shall be to reconvoke the Convention for any cause, or in case the Constitution should not be ratified, for the purpose of taking such measures as may be necessary for the formation of a civil government for the State of Louisiana." This resolution, bitterly opposed at the time by Abell, now offered an opportunity for a coup d'état. It was true that nearly two years had elapsed; the constitution had been adopted and had been in force during that period, and there seemed no good reason for so revolutionary a proceeding. Moreover, the resolution, not having been incorporated in the constitution, had never been passed upon by the people. But the advocates of revocation were reckless. It was widely believed that Congress could be relied upon for support, and if there were any violence on the part of the ex-rebels, Congress would be all the more willing to subject the State to military rule—"a consummation devoutly to be wished." The negroes also, lured on by the promise of the ballot, might be counted on to support the movement. Accordingly, on the 23d of June the following invitation was sent out to the ex-conventionists:—

"NEW ORLEANS, June 23rd.

"Sir,

"Several members of the Convention, as well as the Executive, wish you to attend a meeting of the Constitutional Convention of Louisiana at the Mechanics Institute Tuesday 26th at 2 P. M.

JOHN E. NEELIS, Sec'y."

In pursuance of this call, between thirty and forty members assembled at the time and place mentioned. The original quorum was seventy-six; but the more cautious members, fearing violence, or regarding the call as illegal, refused to come. Judge Durell, the ex-president of the convention, was not present. When questioned by the Select Committee on the New Orleans Riots,¹ Durell declared that he refused to reconvoke the convention, though pressed to do so, because he thought it would result in a riot. However, he called on General Sheridan, and on June 18 he telegraphed to the radical leaders in Congress, Fessenden, Boutwell, and Stevens, to see if he could get their support in the matter. Sheridan said that it would be impossible for him to protect the negroes at the polls, while the leaders at Washington cautiously refused to answer his telegram.² Thus deserted by the Federal authorities, and doubtful as to its legality, Durell refused to further the movement. The radicals, however, found a more compliant agent in R. K. Howell, an associate justice of the state supreme court and a former member of the convention, though he had resigned before the convention closed. At the preliminary meeting of June 26 Howell allowed the minority—only about forty members being present—to elect him president; and on the 8th of July he issued a proclamation reconvoking the convention of 1864 "to revise and amend the Constitution and to consider the adoption of the XIV Amendment." The convention was called to assemble on July 30, in the old Mechanics Institute. Governor Wells, who had given his approval to the preliminary meeting, was now called upon to issue writs of election for the choice of

¹ See the report of this committee for mass of testimony on the riots. 39th Cong., 2d sess., H. Rep. No. 16.

² This telegram is given in Report on New Orleans Riots, testimony, p. 263.

delegates in those parishes which were outside the Federal lines in 1864.

After Howell's proclamation appeared, he was requested by his adherents to visit Washington and to try to discover what was the attitude of Congress toward the movement. Howell afterwards testified before the committee of investigation that he had the impression that certain congressmen had suggested the calling of the convention and the submission of its work to Congress. There was other testimony that this impression was wide-spread in New Orleans and that it was confirmed by Dr. Dostie, R. King Cutler, and others. On arriving in Washington, however, Howell said he found that this was a mistake, though some members of Congress did tell him: "Well, get before us and we will act; we cannot promise you anything; but if your people adopt a constitution with the principles you mention embodied in it, we will entertain it as favorably as we can as individual members of Congress."¹ None of the congressmen consulted raised any legal objections to the reconvening of the convention. Thaddeus Stevens told him that he thought the convention had a right to assemble if it did so peaceably, that the members had a right to do what they pleased if they did not plot treason, and that if they presented a constitution, Congress, he had no doubt, would consider it and the admission of delegates under it; he himself held that "the existing government of Louisiana was a bogus government."² Judge Howell, therefore, received sufficient encouragement at Washington to induce him to persevere in the movement, and on the 24th of July a telegram sent from New Orleans to the Washington correspondent of the New York Times announces: "Howell

¹ Report on New Orleans Riots, testimony, p. 56.

² The Times, July 18, said that Stevens's words to Howell were: "What! revive that d—— bogus concern of Banks'! Sir, it never was legally born; it was a bastard. I never would have anything to do with it while it was alive, and now that it is dead, it may stay in H—— where it belongs." But Stevens's own testimony does not agree with this. Report on New Orleans Riots, testimony, pp. 489, 490.

has returned with the assurance that Congress will support the Convention."¹

It had been hoped by the ex-Confederates that Governor Wells would stand by them and refuse to approve the rump convention. It was known that even the radical Thomas J. Durant held that this convention had no legal right to reassemble, and as President Durell himself refused to preside over it, how could Wells decide to take part in such a coup d'état? But this was exactly what the governor had decided to do. He afterwards testified that he thought the convention had a right to meet, and that as he was the creature of the constitution of 1864, he had to obey its mandates.² The fact was that the governor had become a convert to the theory of negro suffrage, though one year before he had opposed it; and now that he saw that Congress was likely to win in its contest with the president, he was resolved to be on the winning side. Accordingly, on July 27 he issued a proclamation declaring that as R. K. Howell, president pro tem. of the convention for the revision and amendment of the constitution, had reconvoked said convention in New Orleans on July 30 and had called on him to order an election for the filling of vacancies, the said election should be held on September 3 for the choice of fifty-one delegates. He doubtless anticipated that there would be trouble, but, as we shall see, he intended to keep out of it. The action of the governor met with the bitter disapproval of the other state officials. Protests came from the lieutenant-governor, the attorney-general, the auditor, and the treasurer, while the secretary of state refused to sign the proclamation or attach to it the seal of the State.³

It is not surprising that the Democrats should have received with incredulity the early intimations that what they regarded as the defunct convention of 1864 was to be revived. When incredulity gave way to certitude, there were not lacking threats of resistance to such high-handed

¹ Report on New Orleans Riots, p. 40.

² Report on New Orleans Riots, testimony, p. 440.

³ Annual Cyclopaedia, 1866, p. 453.

proceedings. Was a small band of thirty or forty men—a mere fragment of a quorum—to be allowed to upset the existing government, to debar from the suffrage the great mass of the property holders of the State, and to extend that suffrage to the ex-slaves who had never legally enjoyed it, and who would thereby control the destinies of the State? The events of the following years were to show that these were no idle fears. It was a revolution such as the world had never before witnessed. And what legal basis was there for such a revolutionary proceeding? It was only a resolution, passed, indeed, by the former convention, but not valid except by a strained construction. The constitution itself provided for its amendment by act of the legislature and submission to the people. This provision was to be entirely ignored, and two of the most vital measures concerning the welfare of the State—the disfranchisement of the ex-Confederates and the enfranchisement of the blacks—which the former convention had refused to adopt, were to be incorporated in the organic law of the State. And by whom was this revolution to be engineered? By a set of men, many of whom were political adventurers, and none of whom could claim that they any longer represented their constituencies. If the Democrats remained supine and suffered themselves to be disfranchised by this “rump,” who knew but that Congress, as was correctly reported, would recognize the new government and sustain the revolution by the use of troops, the only way in which it could be sustained? The fourteenth amendment, prescribed by Congress as the condition of restoration, was not so radical a measure as the one now proposed, for it did not confer the suffrage on the negro or deny it to the ex-rebel. The new constitution, it was asserted by the radicals, would be “submitted to the people;” but it was believed that the “people” embraced only the blacks and such whites as could prove that they had taken no part in the rebellion; for only thus did such a constitution stand any chance of being ratified. The Democrats were further exasperated by the fact that

some of the leaders of the movement had once been secessionists. Hahn and Howell had held office under the Confederacy, while Cutler had even raised troops for the support of that cause. And now these men were out-heroding Herod in denunciation of rebels.

One of the chief inciters of trouble was Dr. A. P. Dostie,¹ a dentist from the North, who had settled in Louisiana, and who had been auditor of the State under Banks's administration. Dostie had been a consistent Union man, but he was regarded by the Democrats as a crack-brained fanatic. At a mass-meeting of the radicals, black and white, held a few days before July 30, Dostie's speech had been the most intemperate of all, and only seemed likely to stir up trouble between the races. The New Orleans Times of August 3 gave a part of this speech "as taken down by a citizen who is willing to swear that it is correct." It was as follows: "We have 300,000 black men with white hearts, also 100,000 good and true Union white men who will fight beside the black race against 300,000 hell-hound rebels; for now there are but two parties here; there are no 'copper-heads' now. We are 400,000 strong to 300,000, and cannot only whip, but exterminate, the other party. Judge Abell with his Grand Jury may indict us. Harry Hays with his *posse comitatus* may be expected there; and the police with more than 1000 men sworn in may interfere with the convention. Therefore let all brave men and not cowards come here on Monday (July 30th). There will be no such puerile affair as at Memphis, but if interfered with, the streets will run with blood. The rebels say they have submitted and accept the situation, but want you to do the work, and they will do the voting; and will you throw over them the mantle of charity and oblivion?" "We will! We will!" was the unanimous response of the excited throng; to which Dostie vehemently replied: "No, by God, we won't. We are bound to have universal suffrage, though you have the

¹ Page 29.

traitor Andrew Johnson against you.”¹ Ex-Governor Hahn also spoke, saying, among other things, to the assembled negroes, “You are as good as any white man.”² There was no interference on the part of the Democrats with the speakers who uttered these sentiments, but such speeches aroused great indignation and intensified race antipathy. Little was now needed to precipitate a conflict; and the ignorant negroes, thus appealed to by white leaders, dreamed of a future in which they would dominate their ex-masters.

The ex-rebels viewed all these proceedings as actuated, not by any real desire on the part of the conventionists to give larger rights to the negro, but by the desire to obtain the plums of office through negro votes. Most of the conventionists were professional politicians and doubtless had no great leaning toward the abstract justice of universal suffrage. But self-interest happily coincided with the glittering generalities of the Declaration of Independence; and the resolutions passed at the meeting at which Dostie spoke declared the suffrage to be the right of black and white alike provided they had been true to the Union.³

The success of this new movement, in view of the fact that the adult negroes were more numerous than the whites and were eager to side with the radicals, simply meant negro supremacy, an idea to which the Democrats hoped never to become accustomed.⁴ It meant an overturning of the whole social order. The situation was still further aggravated by the fact that under the recent civil rights bill (to be explained later) any negro or other Union man who asserted that he could not get justice in the state courts could have the case brought before United States Commissioner Shannon, and through him transferred to the United

¹ The friends of Dostie later denied that he used such incendiary language, though several witnesses swore that he did. Report on New Orleans Riots, pp. 312, 313, 350, 476, 481, 482.

² Reed, *Life of Dostie*, p. 294.

³ Annual Cyclopaedia, 1866, subject “Louisiana,” pp. 453-4.

⁴ As we have seen above (page 65), the adult negroes were more numerous than the adult whites in 1860, and the majority of the negroes over the whites was increased by the fact that more whites than blacks had fallen in the war.

States courts. Thus the State had lost the power to punish for crime the immense mass of freedmen at a time when recent emancipation and the appeals of white demagogues incited them to unlawful acts.

Mutterings of anger began to be heard among the more reckless citizens, and these increased as the day fixed for the meeting of the convention drew near. The correspondent of the *New York Times* afterwards testified that the better classes hoped that the convention would pass off quietly, but the rowdies and the men who are apt to meet in hotels and public places thought the members of the convention ought to be hanged, and expressed themselves accordingly.¹ Notices were sent anonymously to some prominent Union men advising them to leave the State. Judge Ezra Heistand, a Union man, received a communication saying: "Beware! Ten days. Duly notified. Begone!" This was signed with some cabalistic characters, and below were rough representations of a pistol, a bowie knife, and a dagger, and enclosed was a bit of floss hemp.² This precursor of the Ku Klux Klan was supposed to emanate from an association called the "Thugs."

The city authorities, recognizing that the meeting of this pseudo-convention was fraught with danger for the State and was likely to bring on a riot, made every effort to dissuade the radicals from attempting it. Judge Edmond Abell, himself a member of the convention of 1864, and now judge of the first district court of New Orleans, issued several charges to the grand jury calling attention to the "illegality" of the proposed assembly. The first of these, filed July 3, said to the jury that the constitution of 1864, ratified in September of that year, "is the constitution of the State," and "this constitution makes no provision for the continuance of the convention. . . . any effort upon the part of that defunct body to assemble, for the purpose of altering or amending the constitution, is subversive of good

¹ Report on New Orleans Riots, testimony, p. 17.

² *Ibid.*, p. 5.

order and dangerous to the peace of the State.”¹ This charge was followed on July 23 by another to the same purport though of stronger tone. On August 2 a third charge, explaining that the riot was precipitated by the action of the conventionists, was issued. In the meantime, on July 21, the New Orleans Times announced that on the previous day the respectable portion of the citizens had been startled to learn that Judge Abell had been arrested on a charge of treason. The affidavit charged him “with treason and endangering the liberties of citizens under the Civil Rights Bill as shown in his charge to the Grand Jury.” This arrest was denounced by the Times as an outrage.

The United States officer in charge of the department was General P. H. Sheridan, but as he happened to be absent in Texas he was represented in New Orleans by General Absalom Baird. The latter was notified, on July 25, by Mayor Monroe that the proposed convention was an unlawful assemblage, and that the mayor intended to disperse it by arresting the members and holding them responsible to municipal laws, “unless the Convention was sanctioned by the Military.” Baird replied that if the convention were legal, it should meet; if illegal, its labors should be regarded as harmless pleasantries to which no one ought to object.² Besides, it was not for the mayor to decide whether it was legal or not; this should be left to the United States courts.³

Baird’s action being unsatisfactory, Lieutenant-Governor Voorhies and the mayor informed the general, on July 28, that, as the governor could not be found, they intended to indict the members through the grand jury of the parish, and process would issue through the sheriff to make the

¹ Report on New Orleans Riots, testimony, p. 275.

² Report on New Orleans Riots, testimony, p. 442. This dilemma proposed by Baird was much praised by the radicals, but there was another alternative. The convention, though illegal, might be made legal by the sanction of Congress, and this was precisely what the Democrats feared.

³ In such cases, however, the courts would certainly follow the decision of the legislative department of the government.

arrests. This action Baird refused to permit, saying: "Tell the Sheriff not to do it; with my view of the case, the Convention has a right to meet, and it would be a violation of their rights to arrest the members. If the Sheriff did arrest them, they would undoubtedly, failing to procure redress from the Courts issuing the writs, appeal to me for protection, and, under General Grant's order, I shall feel bound to release them, and possibly to arrest the Sheriff himself." It was, therefore, agreed that the sheriff should serve no writs without the endorsement of Baird.

Both Voorhies and Baird telegraphed to Washington for instructions. Baird, who telegraphed to Secretary Stanton, got no reply, as Stanton did not care to interfere. Voorhies, who telegraphed to President Johnson, received a despatch which read as follows:—

"Washington, July 28.

Sir:

The military will be expected to sustain, not obstruct or interfere with, the proceedings of the courts. A despatch on the subject of convention was sent to Governor Wells this morning.¹

(Signed) ANDREW JOHNSON."

On Monday, July 30, 1866, the convention was to meet at Mechanics Institute. The hour advertised in the newspapers was 12 o'clock. Mayor Monroe, in the morning, issued a strong proclamation, calling upon the citizens not to disturb the peace and order of the city. He also ordered the police to assemble at headquarters to be ready for any emergency.

Between 10 and 11 o'clock a. m. Lieutenant-Governor Voorhies called on General Baird, taking with him the despatch he had received from the president. As Baird, however, had received no answer to his despatch, he was not willing to permit the issuance of any writs of arrest unless endorsed by him; but he agreed to order up some troops

¹ Report on New Orleans Riots, testimony, p. 443. The despatch sent to Wells was published in the New Orleans Times of August 7. It asked Wells by what authority he had called the convention. The governor retorted that it was not he, but Howell, who had convoked it. These communications seemed to have closed the relations between the governor and the president, who were no longer in sympathy with each other.

from Jackson barracks (three miles from Canal Street) to be used in case of a serious disturbance which the civil authorities were not strong enough to quell.¹ As soon as Voorhies left him—which was about 12 o'clock, says Baird²—the latter sent a message to the barracks ordering up the troops, but for some unexplained reason Baird was laboring under the impression that the convention was to meet at 6 p. m., and not at 12 m., though this hour had been advertised in the newspapers. Hence he did not hasten the coming of the troops until he learned that the convention had already met. Even then there was unnecessary delay, and the troops did not reach Canal Street until 2:40 p. m., when the riot was practically over. Had there been no misunderstanding on the part of Baird and his officers, the troops might have arrived in time to prevent some of the worst features of the riot, though this is not certain.³ It is clear that both Voorhies and Mayor Monroe expected the cooperation of Baird's troops, and that Baird and his officers were the only persons in New Orleans who had received the impression that the convention was to meet at 6 p. m.

Governor Wells had been in the city since Friday, but since his proclamation he had taken no active part in the proceedings. He visited his office about the time the convention was to meet; but scenting trouble, he went to see General Sheridan. Finding that the latter was still in Texas, the governor, though a friend informed him that his son was in the convention and might be dead, retired to his residence and remained there. He had summoned up

¹ According to Voorhies's testimony before the investigating committee, some members of the convention had also requested Baird to bring up troops, but he refused their request on the ground that he did not wish to side with either party. Baird, however, says, "No request had been made to me for them [troops]—no intimation that their presence would be desired." Report on New Orleans Riots, testimony, pp. 237, 444.

² Voorhies says in his testimony that it was earlier.

³ Voorhies testified that he sent three notes to Baird, the first as early as 10:30 a. m.; but Baird testified that he received only two, the first arriving about 12:30. It is impossible to reconcile their testimony. Report on New Orleans Riots, testimony, p. 237.

a spirit that he had no desire to down. We may well imagine that as he slipped away to his home he muttered the words of Antony: "Now let it work. Mischief, thou art afoot. Take thou what course thou wilt!"

The conventionists met without any opposition at 12 m. They had held a preliminary meeting at 10 a. m. at the custom-house to arrange sureties in case they were arrested. There was no fear among them of a riot; and Dr. Dostie stated to a friend that if there were trouble, he expected the military to be on the ground immediately. When they assembled at Mechanics Institute, prayer was offered by Dr. Horton, but as there was no quorum (only twenty-five being present), there was an adjournment until one o'clock. The sergeant-at-arms was sent out to drum up members who were too timid or were otherwise unwilling to come. Many of the members remained in the hall, but Judge Howell went down to the governor's room, which was in the same building.

Judge Howell had hardly gotten downstairs to the governor's room before a procession of negroes arrived in front of the Mechanics Institute with a United States flag and a drum. As this procession crossed Canal Street a white man jostled one of the negroes in the procession. The negro retorted with a blow, whereupon the white man fired at him a shot from his revolver. The procession, however, moved on. In front of the Institute it halted, and there was much hurraing. In some way not clear a conflict was precipitated between the blacks and the whites. The testimony of Union men showed that the negroes were to some extent armed, and that the first shot was fired by a negro at a policeman who had arrested a newsboy for stirring up trouble. Soon after, the police, special and regular, who had been massed at headquarters by the mayor, came up in large numbers¹ and charged the procession. The negroes, after hurling brickbats at their opponents, took refuge in the convention hall.

¹ Many "specials"—ex-rebels it was said—had been sworn in.

Many of the police, becoming infuriated, fired into the assembly room, and those of the inmates that were armed returned the fire. The Rev. Dr. Horton, waving a white handkerchief, cried to the police: "Gentlemen, I beseech you to stop firing; we are noncombatants. If you want to arrest us, make any arrest you please, we are not prepared to defend ourselves." Some of the police, it is claimed, replied, "We don't want any prisoners; you have all got to die." Dr. Horton was shot and fell, mortally wounded. Dr. Dostie, who was an object of special animosity on account of his inflammatory addresses, was a marked victim. Shot through the spine, and with a sword thrust in the stomach, he died a few days later. There were about one hundred and fifty persons in the hall, mostly negroes. Seizing chairs, they beat back the police three times, and barred the doors. But the police returned to the attack, firing their revolvers as they came. Some of the negroes returned the fire, but most of them leaped from the windows in wild panic. In some cases they were shot as they came down or as they scrambled over the fence at the bottom. The only member of the convention, however, that was killed was a certain John Henderson. Some six or seven hundred shots were fired. Negroes were pursued, and in some cases were killed in the streets. One of them, two miles from the scene, was taken from his shop and wounded in the side, hip, and back. The dead and wounded were piled upon drays and carried off.¹

While some of the police were firing indiscriminately, others of them arrested ex-Governor Hahn, W. R. Fish, and several more, and escorting them through the excited crowd, saved their lives by shutting them up in the police station. Hahn was bruised and wounded, but not seriously. His life was saved with some difficulty, for the disorderly and ruffianly element of the citizens was abroad, and clamored to get hold of the ex-governor. Many of them were drunk and infuriated. Some of the conventionists

¹ Report on New Orleans Riots, *passim*.

testified that they owed their lives to the exertions of the police who protected them, but others of the police force took no prisoners. Thomas E. Adams, chief of police, testified that he knocked down four or five of his men for acts of brutality. The only man killed on the side of the Democrats was Edgar H. Cenas, a son of Dr. Cenas, who met his death accidentally by the discharge of a policeman's pistol. Ten policemen were wounded slightly, seven of them by pistol shots, a fact which showed that their opponents were armed and prepared to meet violence with violence. On the side of the convention Dr. A. Hartsuff, of the United States army, reported to the investigating committee that he believed ten colored persons had been killed and twenty wounded, but about these he could get no absolute facts. His approved record was as follows:—

	Killed.	Wounded.
Members of the convention	1	8
White citizens loyal	2	9
Colored citizens	34	119
Policemen		10 ¹
White citizens disloyal	1	
	38	146

The troops ordered from Jackson barracks arrived about 2:40 p. m. Placing himself at their head, General Baird took possession of the principal streets. The riot was practically over, but the general declared martial law to stamp out any remains of disorder.² He exasperated the citizens by patrolling the streets with negro troops, who, it is said, committed many petty outrages. Major-General A. V. Kantz was appointed military governor of the city, and was continued in this office for a while by General Sheridan. Mayor Monroe declared such action superfluous, and said he would not serve under a military governor. But General Kantz was not relieved and the civil officials were not re-

¹ The mayor and lieutenant-governor reported to the president that forty-two policemen and several citizens were either killed or wounded.

² All the persons arrested by the police were promptly set at liberty.

stored until some weeks later. Even then, martial law was "continued and enforced so far as was required for public peace and protection of property."

When Sheridan returned from Texas, on August 1, he telegraphed to General Grant, "Everything is now quiet, but I deem it best to maintain a military supremacy in the city for a few days." He condemned the affair of July 30 as "an absolute massacre," accusing the mayor and the police of the city of having perpetrated it. When, on August 4, President Johnson telegraphed to him for details of the affair, he gave a brief account, adding that none of the mob had been indicted, though a number of the conventionists had been arrested.¹ He also declared that King Cutler, Hahn, and others have been "political agitators, and are bad men." Of Governor Wells he said, "During the late troubles he has shown very little of the man."

The universal suffrage men sent up a petition to Congress² in which they called July 30 "the St. Bartholomew day of New Orleans," and protested "against being left to the tender mercies of the assassins who use the knife and pistols." A long report was also made by a committee of officers appointed by General Baird. It naturally upholds the action of their superior in every particular, and finds that there was a design on the part of the ex-rebels to crush the convention "if the occasion offered."³

The most elaborate report of the riot was made by the special committee of Congress in the winter of 1867. It contains about six hundred and seventy-three pages giving the reports of the majority and the minority and the testimony upon which they were based. One hundred and ninety-seven witnesses were examined, some favorable and

¹ On August 2 General Baird, with the consent of General Sheridan, permitted Sheriff Hays to execute writs of arrest upon members of the convention. Report on New Orleans Riots, testimony, p. 448. They were indicted under an old territorial law for creating a riot, but the cases seem never to have come to a trial.

² Annual Cyclopaedia, 1866, subject "Louisiana," p. 458.

³ Times, October 8, 1866. That paper condemns it as unjust, being based on radical testimony. Blaine praises it as non-political and trustworthy.

some unfavorable to the convention. The majority of the committee, consisting of Thomas D. Eliot of Massachusetts and Samuel Shellabarger of Ohio, reported that "in our National history, there has been no occasion when a riot has occurred so destitute of justifiable cause, and so fiendish as that which took place in New Orleans." They justify the call of the convention on the ground that this convention in 1864 had provided for a reconvoation in case the State were not readmitted into the Union; while they ignore the fact that the president, who was authorized to recall it, refused to do so. They declare that the riot was pre-arranged by the mayor, the chief of police, and the lieutenant-governor, and that none of the responsible parties had been punished. They justify the action or want of action of General Baird in not getting up the troops in time. The speeches of the radicals on the Friday preceding they find were earnest and emphatic, but nothing was said that could excite any just apprehension of violence. The report then rebukes President Johnson for saying in a speech at St. Louis on the 8th of September that the reconvoing of the convention could be traced back to the radicals in Congress, "whereas no encouragement had been given by the said radicals." To sustain this position, the majority quoted a part of the testimony of Judge Howell, omitting that portion where he testified that some members of Congress said to him, "If your people adopt a constitution with the principles you mention embodied in it, we will entertain it as favorably as we can as individual members of Congress."¹ They also quoted the general denial of some of the radicals that they had encouraged the movement, but omitted those portions of Thaddeus Stevens's testimony in which he said, "I got one or two letters from him [Flanders of Louisiana], and I may have answered them," and "I recollect perfectly well saying verbally to Judge Howell that I thought they had a right to meet if they did it peaceably; . . . and that if they framed a constitution and presented it to Congress I had no

¹ Report on New Orleans Riots, testimony, p. 56.

doubt Congress would consider it, . . . for that I held that their present government was a bogus government.”¹ The report of the majority further states that the Democratic legislature of Louisiana in January, 1866, had proposed to the people the question of calling a constitutional convention—a measure not provided for in the constitution of 1864, and hence as unconstitutional as the recalled convention in 1866 was alleged to be.² The majority further stated that, in spite of some testimony to the contrary, it had been shown that Union men would not be safe in Louisiana if the military and the Freedmen’s Bureau were withdrawn. Hence they recommended that a “provisional government be established and maintained by military power until the time has come when Louisiana is controlled by loyal men and may be restored to her former practical relations to the Union, without endangering its security and peace;” and in accordance with a resolution under which it was appointed, the majority reported a bill providing for such government.

The minority report of Boyer, of Pennsylvania, contradicted the majority report in nearly every particular. It declared that the “rump” convention was illegal; that the utterances of the orators on the preceding Friday were inflammatory; that the first shot at Mechanics Institute was fired by a negro at a policeman; and in extenuation of the acts of the Democrats it called attention to the murders of negroes in Philadelphia in former years and to the much bloodier riots of recent date in New York, resulting in the wanton murder of several hundred negroes who had committed no offence whatever. The general conclusions of the report were as follows:—

¹ Report on New Orleans Riots, testimony, pp. 489, 490.

² This charge was practically admitted by the minority, though there was really no ground for it. The committee seemed to be ignorant that when state constitutions provide for their revision and not for their own destruction, the recognized and usual method of framing a new constitution is not to reassemble a former convention, but to submit the question to the people through the existing legislature. Report on New Orleans Riots, testimony, p. 517.

1. The riot of July 30 was a local disturbance, originating in local circumstances of great provocation. It was not an outcropping of the rebellion, nor did it show any indication of a desire to renew hostilities with the Federal government.

2. It would be a monstrous injustice to hold the whole people of the State accountable for the acts of the few engaged in the riot, and to abrogate by act of Congress the civil government of the State now in peaceful and successful operation.

3. The incendiary speeches and revolutionary acts of the conventionists would probably have led to a riot in any city of the Union.

4. "To provoke an attack on the colored population, which was expected to be suppressed by the military before it had seriously endangered the white leaders, appears to have been part of the scheme of the conventionists. This would afford an excuse for congressional investigation, resulting in congressional legislation favoring the ultimate design of the conspirators, viz: the destruction of the existing civil government of Louisiana."

5. In no proper sense is the riot attributable to the government of Louisiana. If there be any members of the government of Louisiana in whose official or personal acts the remote causes of the riot are to be traced, the chief among them are Judge R. K. Howell, who, as usurping president of the minority of an extinct convention, headed the conspiracy to overthrow the state government which he had sworn to support, and Governor Wells, who lent to the conspiracy his official sanction, but on the day of danger deserted his post, without an effort to preserve the public peace. And if there be any members of the Federal government who are indirectly responsible for the bloody result, they are those members of the present Congress, whoever they may be, who encouraged these men by their counsels, and promised to them their individual and official support.¹

This report of Boyer, while it had absolutely no influence

¹ Report on New Orleans Riots, p. 60.

on the radicals in the North, was a strong defence of the anti-conventionists. To the present writer it seems to come much nearer an unprejudiced statement than that of the majority. The two reports, however, illustrate the well-known fact that two persons hearing the same testimony may, by the rejection of certain parts and the acceptance of others, arrive at diametrically opposite conclusions and yet leave their honesty unimpeached.¹ In February, 1867, the report of the committee on the New Orleans riots was ordered by Congress to be printed. Feeling against the Louisianians was strong. No one of the Republicans seems to have considered the minority report worthy of consideration. In a debate in Congress on February 12 Shellabarger enforced his majority report by declaring that though the courts in Louisiana were open, they were under rebel control and authority, and for the purpose rather of protecting and shielding criminals than punishing them, especially when the crime was of a political character. Boyer rose to say that the statement of the gentleman was unfounded in fact, but the words of Shellabarger accorded with the humor of the majority.

A few facts must be clear to the reviewer of the testimony. Judge Howell received encouragement from certain radical congressmen, without which and the presence of Federal troops in New Orleans the convention would not have ventured to meet. The meeting was regarded by the great

¹ Subsequent writers have taken sides in the same manner. J. W. Burgess says, "Common sense and common honesty would hold that the convention had been finally dissolved, no matter how the wording of the resolution might be forced in the opposite direction." *Reconstruction and the Constitution*, p. 93. Blaine, however, says the report of the majority was corroborated by the testimony of the army officers, who were not suspected of partisanship; he condemns the riot, and coolly declares that the new constitution was to be submitted to the vote of the white people. Whatever the convention, therefore, might do would be ineffectual unless approved by the majority of the white voters of the State; hence it could not be claimed that negro suffrage was to be imposed on the State. Blaine herein ignores the fact that it was intended either to submit the constitution to Congress for ratification or to an electorate composed of negroes and Union men. Such a constitution could not be ratified by the white voters. *Twenty Years*, II, 237, 234.

majority of whites as unlawful and dangerous. The speeches of the orators on the preceding Friday were believed by all Democrats and many Republicans to be incendiary. General Baird made a most unfortunate error in not either bringing up troops or allowing the arrest of the conventionists. Some of the police and some of the citizens of New Orleans behaved with great brutality toward the negroes who assembled to support the convention. Yet neither the majority nor the minority report shows any real appreciation of the natural exasperation felt by the white people of New Orleans when it was found that a handful of men proposed, with the assistance of the Federal government, to establish negro supremacy in their midst by putting the heel of the ex-slave on the neck of his former master.

In about two weeks after the attempted meeting of the convention, affairs in Louisiana had fallen into their usual routine. On August 16 the New Orleans Times said: "The riot has ceased to become food for gossip. The dead body of the Convention of 1864 is lying in the Radical press. The Coroner has been notified, and will bring a disinfectant in his pocket." Unfortunately, however, for the whole South and for Louisiana in particular, President Johnson in the summer of 1866 made his notorious journey through the West—"the swing around the circle"—during which he took occasion to make a series of indignant and undignified speeches. He bitterly attacked the radicals for keeping out of Congress the representatives from the South, and accused them of encouraging the proceedings in Louisiana which resulted in the riot. However true these charges may have been, they only served to intensify the antagonism of the radicals to the presidential policy. The president vented his spleen in vain against Sumner, Stevens, and other extremists; for the fall elections showed only too plainly that the verdict of the people in the States now represented in the Union was overwhelmingly in favor of congressional, rather than presidential, reconstruction.

It was known that the president was opposed to the adoption of amendments by States that were excluded from representation in Congress; it was said that he actually advised southern legislatures to reject the fourteenth amendment. Certainly when these legislatures met in the fall of 1866 and the winter of 1867, they with one accord and by large majorities rejected that amendment.¹ The New Orleans Times argued that to adopt the amendments when representation was denied was to bow to the will of the radicals, and to barter honor, faith, and manhood for political rights and advantages.² But the attitude of the South was regarded by Congress as a defiance to that body, to be answered by sharp measures of repression. The fourteenth amendment was regarded as an olive branch, rejected by a stiff-necked people determined to persecute Union men and freedmen and to force³ their way into Congress on their own terms.

The Louisianians were indignant that the radical press of New Orleans continued to defend the conventionists and to assert that Union men were not safe in Louisiana. The New Orleans Times pointed to the fact that while the radicals were saying that Union men were in danger of their lives in Louisiana, between five and ten thousand Union soldiers had settled in Louisiana. The same newspaper complained that any instance of violence in the South was seized upon by the radicals of the North as justification for extreme and unjust propositions of reconstruction,⁴

¹ The Louisiana legislature rejected it unanimously February 9, 1867. Governor Wells approved the rejection on the ground that the amendment was not radical enough.

² Times, February 1, 1867.

³ J. R. G. Pitkin, of Louisiana, who was a secessionist in 1860, and wore the gray, was now making speeches in Philadelphia in which he declared, "The meeting of the Convention was made a pretext on the part of the Rebels to slay not only the members of that body, but all the Union men of the City." Warmoth was making similar speeches in the North. Times, October 1, 1866.

⁴ W. A. Dunning calls attention to the fact that acts of violence had always been more common in the South than in the North, but that the latter section viewed them improperly as a recrudescence of rebellion to be repressed by Federal legislation. *Essays on the Civil War and Reconstruction*, p. 140.

though these accounts were frequently from irresponsible sources. On such reports grave senators based plans of settlement of national troubles. "But," continues the *Times*, "the unsettled state of our political affairs, the uncertainty of our civil condition, the discontent, and with the more sensitive and excitable, the despair as to our future, are the principal sources of such disorders as may arise in the South. Citizens, whose influence, authority, and example are very great, are prevented by their uncertain status from controlling the thoughtless and the reckless. Men who would be powerful agents in restoring good feeling and an earnest love of the Union, are driven by remorseless ostracism into indifference to public concerns and patriotic duty; into engrossment in private and selfish affairs. They are in danger of rapidly gliding into the temper of foreigners who come here to make money. There is another consideration, in view of which the reported instances of lawlessness and disloyalty in the South, upon which our sectional enemies dwell with such indignant emphasis, ought to be regarded with little significance. It is this: We boldly affirm that so radical, comprehensive, and violent revolution in the political and social condition of a people was never before attended by so little of social disorder."¹

About the same time² General P. G. T. Beauregard, a beloved son of Louisiana, and representative of the best sentiment of the State, wrote a letter to the *Times* saying: "The South will not and should not accept the Amendments [sic] even if presented as a finality. We feel we are now at the mercy of the North. I believe the South should remain passive spectators of the struggle for power going on at the North, relying on the sober second thought and the sense of justice of both parties to protect the South." It was also held that the South should maintain by its firmness and consistency the policy of President Johnson, now regarded as the staunch friend of that section. Perhaps also

¹ *Times*, January 3, 1867.

² *Times*, January 11, 1867.

the Supreme Court, which had just declared the test oath for lawyers practising in Federal courts to be unconstitutional,¹ would, as soon as a case came before it, pronounce other reconstruction acts to be of the same character.² To stand firm, therefore, "were wisdom in the scorn of consequence."³

Why, it may be asked, did not Louisiana accept the status quo and, like Tennessee, admit the negro to the suffrage? One important reason is that in Tennessee the negroes were in the minority, while in Louisiana they were in the majority. Hence negro suffrage in Louisiana, where practically all negroes had been won over to the Republican side, meant to hand over the State to the lawless class, who could enact laws to bring about miscegenation, mixed schools, and, in general, the social equality for which the negro organs were clamoring.⁴

The only thing that embarrassed the radicals in Congress in the determination to force negro suffrage on the ex-rebel States was that in many of the Northern and Western States the suffrage was granted only to whites,⁵ even where the negroes were in the minority. Was it fair, therefore, to compel those Southern States to adopt it where the negroes were in the majority—either actually, or by the

¹ *Ex parte Milligan*, 4 Wallace, 2-142.

² *Times*, March 6, 1867.

³ Blaine says: "Governor Parsons of Alabama telegraphed him [President Johnson] indicating that the rejection of the Fourteenth Amendment might be reconsidered by the Alabama Legislature, if in consequence thereof an enabling Act could be passed by Congress for the admission of the state to representation. Johnson promptly replied on the same day: 'What possible good can be obtained by reconsidering the constitutional amendment? . . . There should be no faltering on the part of those who are honest in a determination to sustain the several co-ordinate Departments of the Government in accordance with its original design.'" *Twenty Years*, II, 249-250.

⁴ *New Orleans Tribune*, April 11 and 14, 1867. Yet Blaine says, "The madness of this course on the part of Southern leaders was scarcely less than the madness of original secession." *Twenty Years*, II, 248.

⁵ In five New England States negroes were allowed to vote; New York and Connecticut permitted negroes with certain property or other qualifications to vote; but in every other Northern State the suffrage was restricted to white men. Blaine, *Twenty Years*, II, 244.

disfranchisement of ex-rebels—and thus transfer political power to the hands of the ignorant and landless classes? The radicals, however, facing this question, found an easy answer. Civil rights might be obtained in the North for the negro without the suffrage; in the South the ballot was the only means of protecting those rights. True, the smouldering rage of the South might break forth in revolutionary form, but the military rule was at hand to crush any such outburst. The South must submit even though she found herself confronted with a condition of things anomalous in the history of the world. In Rome, slaves when freed were still, though they might be equal in race, subject to the authority of their former masters. Here an inferior race was suddenly, by the accident of a civil war, to be lifted to a dizzy height of political power. By their numbers, as well as by the disfranchisement of the ex-rebels, they were to be made the ruling class, dictating laws to their former masters.¹

¹ Full social rights and privileges may exist for a time without political rights as in the case of women, but full political rights will almost certainly be followed by social rights. It is inevitable where the class raised to political equality is in the majority that the legislative power will enable such a class to dictate the terms of social equality. It was this instinctive knowledge which made the whites determined to overthrow negro domination.

CHAPTER VIII.

THE RECONSTRUCTION ACTS, 1866-1867.

In the winter of 1866-67 the Republicans in Congress, flushed with their success at the polls in the preceding autumn, decided to carry out a radical program of reconstruction in the South. They entered upon the accomplishment of their plans with the greater enthusiasm because of the fact that their plans were known to be particularly objectionable to the president, whom it was now their aim to humiliate. As Thaddeus Stevens expressed it: "Though the President is Commander-in-chief, Congress is his commander; and, God willing, he shall obey. He and his minions shall learn that this is not a Government of king and satraps, but a Government of the people, and that Congress is the people."¹ If they needed further justification of their determination to subject the South to a Cromwellian method of reconstruction, they could point to the reports, appearing in radical newspapers of that section, telling of the oppression by the Democrats of the freedmen and their allies, the loyal whites. Such reports supplemented the majority report of the committee on the New Orleans riots, which was placed before Congress in February, 1867.²

Already on December 5, 1866, Sumner had offered a series of resolutions in the Senate, which were ordered to

¹ Annual Cyclopaedia, 1867, subject "Congress," p. 206. The president, on the other hand, insisted that the constitution is the organic law of the people, even against Congress. Ibid., p. 654.

² While the Republicans had a sufficient majority in Congress to pass measures over the president's veto, the radical Stevens was much disgruntled at the lack of unanimity in the House toward the measures he advocated. He derided the "Babel which has been produced by the intermingling of secessionists, rebels, pardoned traitors, hissing Copperheads, and apostate Republicans." Annual Cyclopaedia, 1867, subject "Congress," p. 205.

be printed. They defined in clear-cut terms what was to be the policy of Congress: (1) Executive reconstruction is usurpation. Reconstruction must be conducted by Congress. (2) New governments in the South must be fashioned according to the requirements of a Christian commonwealth, so that order, tranquility, education, human rights, shall prevail within their borders. (3) In determining what is a republican form of government, Congress must follow implicitly the definition supplied by the Declaration of Independence; and in the practical application of this definition it must, after excluding all disloyal persons, take care that new governments shall be founded on the two fundamental truths therein contained: (a) that all men are equal in rights, and (b) that all just governments stand only on the consent of the governed.¹ In explanation of the fact that the consent of the disloyal was not necessary, Stevens explained that disloyal persons were malefactors. As the disloyal "malefactors" might prove to be more numerous in some Southern States than the loyalists, it was, of course, necessary to guard against opposition in carrying out this program by subjecting the South to military rule.

Some members of Congress maintained that it was wrong thus to make negro suffrage the test of true republicanism in the South and not in the North, Le Blond, of Ohio, suggesting that as his State did not give suffrage to negroes, it should be put out of the Union. Boutwell, of Massachusetts, however, answered this pertinent question by declaring that though Congress was not able to make Ohio truly republican, it should exercise that power wherever it could. Thus the South could become a model after which the North might fashion herself. The Union Democrats ingeniously insinuated that the maintenance of a republican form of government in the South had been confused by the radicals with the maintenance of the Republican party in power. This insinuation was either ignored or answered to the effect that the Republican party, in supporting the

¹ There was a fine irony in quoting the father of Democracy against the Democrats of the South.

Union, had stood for republican government, while the Southern Democrats, in attempting its overthrow, no longer represented anything but treason and the suppression of equal rights.¹ Moreover, if negro suffrage was to be enforced in the South, it was only because that section had rejected the fourteenth amendment.

In accordance with Sumner's resolutions, and in spite of the able veto messages of President Johnson, the famous—or in the eyes of the Democrats the infamous—acts of reconstruction were passed by Congress in the spring of 1867. The first, under date of March 2, was, in substance, as follows: As no legal state governments or adequate protection of property existed in ten of the Southern States, these States should be divided into military districts, subject to the military authority of the United States, and under command of an officer of the army appointed by the president. This commanding officer should protect property and life and punish insurrection or disorder, using for this purpose the existing civil courts or, at his discretion, military tribunals.² It was further provided that when any one of these States should have framed a new constitution in a convention composed of delegates elected by voters without distinction of color or race, except such as had been disfranchised for participation in rebellion or for felony, and when this constitution should provide that the elective franchise should be enjoyed by all having the qualifications given above, and when such constitution should have been

¹ It was especially distasteful to Stevens that in South Carolina 200,000 whites should rule 400,000 blacks.

² In his veto the president called attention to the fact that in the recent *Milligan* case the Supreme Court had decided that martial law cannot exist where the courts are open and in the proper exercise of their jurisdiction. *Annual Cyclopaedia*, 1867, subject "Public Documents," p. 655. But Stevens denounced this decision as infamous, "dangerous to the lives and liberties of the loyal men of the country," and urged that on account of the decision the reconstruction act should be immediately passed. *Ibid.*, p. 210. Perhaps Stevens also held that the *Milligan* case did not apply to the South because there were no lawful governments there, or at least only provisional ones. By others it has been held that the *Milligan* case only decided that the president had no right to establish such military tribunals.

approved by the majority of voters and by Congress, and when the legislature of such State should have adopted the fourteenth amendment and the said amendment should have become a part of the Constitution of the United States, then the said State should be entitled to representation in Congress: provided that no person excluded from holding office by said fourteenth amendment should be a member of the convention or vote for any member. Finally, until representation in Congress should be granted to the rebel States, their existing civil governments should be deemed provisional and subject to modification or removal by the Federal government. A few weeks later, on March 23, for fear that the rebel States might not accept these drastic measures, preferring to remain without representation in Congress, a still more strenuous act was passed. This supplementary act took the initiative out of the power of the State and placed it in the hands of the commanding general in each district. It declared that before September 1 of the current year each general in his district must hold a registration of persons qualified to vote (of undoubted loyalty), and then proceed to carry out the provisions of the preceding act.

When this act was put in force, however, it was found necessary to legislate still further against the obstacles which the president and his legal advisers were placing in the way of the "thorough" process of government instituted by the radical Congress. Accordingly, by a supplementary act of July 19, it was provided among other things: first, that in the removal of state officers the commanding general should be subject to the disapproval, not of the president, but only of the general of the armies of the United States, thereby placing Grant above his commander-in-chief, Johnson; second, that the oath of a person swearing that he was entitled to register should be rejected by the board if it thought proper, while if any persons qualified to register should fail to do so, their names should be placed on the registration list by the board, a provision which made the board absolute master of the situation since in its discretion

it could go behind the solemn oath of the would-be voter and exclude him, while registering others who had not applied; third, that no pardon or amnesty of the president should entitle any one to vote who was previously disqualified, and that no district commander should be bound in his action by any opinion of any civil officer of the United States—a provision which was added because the attorney-general of the United States had given the president two opinions on the first act which promised to interfere seriously with its execution.

Having thus nullified the effect of executive pardon as well as of any other act of interference on the part of the president or his civil advisers, Congress felt that its hands were free to work its will on the South. It would, moreover, cap the climax of its power by the impeachment of a president who had vetoed these bills, and who, in its eyes, had been guilty of other crimes and misdemeanors. Rebellion in the executive chair and rebellion in the South should be crushed at the same time.¹

Let us briefly consider how these laws affected the people of Louisiana. During the winter of 1867 the General Assembly had been encouraged by the firm attitude of the president to resist the measures of reconstruction proposed by Congress. It was held that the president was right in declaring that the Congress at Washington, as long as the South was unrepresented, was no real Congress; it was merely a rump parliament. When the fourteenth amendment was brought before the legislative body for ratification, the members were not pleased to learn from the governor's message that he regarded the amendment as an inadequate measure, and that he should be satisfied only with the granting of equal rights to all. The legislature, as we have seen, promptly rejected the amendment by a unanimous vote (February 9), and suggested that Governor Wells be impeached. In view of the threatening attitude

¹ On March 2, the same day on which the reconstruction bill was passed, the judiciary committee made a preliminary report which led to the impeachment of the president.

of Congress, the New Orleans Times declared the rejection of the amendment to be "an heroic act."

The passage of the first reconstruction act three weeks later was not unexpected, and was received with calmness by the Democrats and with satisfaction by the governor and those who sympathized with him. Wells immediately declared that an election for aldermen in New Orleans should be subject to the provisions of the new act. The Times denied the right of the governor to interfere, saying that such action belonged to the military officials. The commanding general, Sheridan, took up the matter, and decided that on account of the troublous condition of affairs the election should be postponed.

The Times of March 17, echoed by the country papers, advised the people of the State to accept as gracefully as they could all the provisions of the reconstruction program; only in this way would they escape military rule and a possible confiscation of property.¹ As negro suffrage was now seen to be inevitable, Duncan F. Kenner, a prominent politician of the State, issued an appeal to the people not to remain inactive, as some proposed, but to accept the negro as a voter, and try to influence him to vote in the interests of the South. A few days later this appeal was followed by an open letter from that distinguished son of Louisiana, General P. G. T. Beauregard, also counselling submission and taking what eventually proved to be a very optimistic view of the situation. "If the suffrage of the negro," he said, "is properly handled and directed, we shall defeat our adversaries with their own weapons. The negro is Southern born. With a little education and a property qualification, he can be made to take an interest in the affairs of the South, and in its prosperity. He will side with the whites." About the same time, March 18, General James Longstreet, the distinguished Confederate leader, who had taken up his residence in New Orleans, published

¹ Thaddeus Stevens favored confiscation and criticised the president for restoring confiscated property. *Annual Cyclopaedia*, 1867, subject "Congress," p. 235.

two open letters in which, also, submission to congressional legislation was urged. "We are a conquered people," he said. "Accept therefore, the terms offered by the conqueror. Our people desire that Constitutional Government should be reestablished, and the only means to accomplish this is to comply with the requirements of the recent congressional legislation." He added that all should return to their allegiance in good faith, or leave the country.

So far Longstreet's utterances received the approval of prominent Confederates; but in the following June the *Times* accused him of having given "his adhesion to a party whose whole policy seemed to be one of vindictive persecution and abuse of his [Longstreet's] late Confederates in arms." Longstreet answered rather tartly that "the war was made upon republican issues, and it seemed fair that the settlement should be made accordingly." This confusion of the Republican party with the radicals then in control was sharply attacked by the *Times*, which pronounced Longstreet's position to be a false one, and added that the general was already claimed as a convert by a portion of the Republican party, and was spoken of as a possible United States senator.¹ Longstreet, now alienated from his old friends, permitted without a protest a radical newspaper of New Orleans to say of him: "The great crimes of his life have been partially atoned for by the sincerest repentance that has yet been brought to light."² Among the prominent Confederates, however, Longstreet seems to have been alone in "going over to the enemy."

¹ *Times*, June 8, 1867.

² *The Republican*, August 9, 1867. His conversion was rewarded with the office of surveyor of customs (1867-1873). Longstreet, in June, 1867, wrote to General Lee asking his approval of his (Longstreet's) position; but Lee answered: "I cannot think the course pursued by the dominant political party the best for the interests of the country, and therefore cannot say so, . . . This is the reason why I could not comply with the request in your letter." Jones, *Reminiscences of Lee*, p. 228. Longstreet's wife, in her account of this period, said that to stand up against public opinion in New Orleans "was the noblest act of her husband's life." "By accepting Federal office, he lost a good business in cotton and insurance." Perhaps there is room for an honest difference of opinion.

His defection aroused much indignation; his desertion of his people seemed so much the worse that it came in their critical hour of distress, when wise and faithful leaders were sorely needed.

Two events soon came to modify the earlier optimistic views of the ex-Confederates. The first was that Sheridan began almost immediately to show the mailed hand. On March 27 he removed from office Attorney-General A. S. Herron, Mayor John T. Monroe, and Judge Edmund Abell, appointing in their places B. F. Lynch, Edward Heath, and W. W. Howe, who were all believed to hold radical views. Before the indignation caused by this legal but drastic measure had subsided, Sheridan ordered his registration appointees to exclude from registration all those about whose rights there was any doubt. The result, according to the *Times*,¹ was that more than one half the white citizens qualified under the law to register were refused the privilege, under one pretext or another, while every negro was immediately accepted. "Such a miserable farce," added that journal, "such trampling on all law, decency, and right, will arouse further hostility." The second fact that now became patent was that the negroes now registered would vote, not with their old masters, but with the party which had conferred on them the suffrage. By July 26 the number of blacks registered was 78,230, while the number of whites was only 41,166. Moreover, the negroes had already been organized against the whites in reconstruction clubs, loyal leagues, lodges, and "Companies of the Grand Army."²

Democratic optimism now changed to pessimism. The white radicals were triumphant; the negroes were jubilant. Now, at last, they believed that they had reached the promised land. They were to vote, to hold office, to make laws. Nay, more: "We want," said the negro organ, "to

¹ April 21, 1867.

² The New Orleans Republican, November 17, 1867, announced that the Republican party in Louisiana had 94 clubs and 57,300 members. The Loyal League, which was merely a branch of the Union League of the North, was elaborately organized, and held the negroes to a stern discipline.

ride in any conveyance, to travel on steamboats, eat in any steamboat, dine at any restaurant, or educate our children at any school."¹ On July 4 the orator of the day, J. R. G. Pitkin, encouraged them to believe that their dream would be realized; for after commending negro suffrage, he added, "But if my colored brother and myself touch elbows at the polls, why should not his child and mine stand side by side in the school room?" Such utterances confirmed the Democrats in their belief that political equality was the first step toward social equality.

A system of "star" cars, by which the blacks were separated from the whites, existed in New Orleans at this time, and on May 5 the presidents of the street railways called on General Sheridan to know if they could obtain his assistance in confining the negroes to the "star" cars. Sheridan refused to issue any instructions on the subject. Two days later some negroes forced their way into the cars for whites, and nearly precipitated a riot. Two weeks later the Times announced that the system of "star" cars had been abandoned because neither Sheridan nor the mayor would protect the drivers in enforcing it. The former, it was said, refused to act because he was unwilling to enforce the rules against his own negro troops. After this small triumph, the negroes began to demand mixed schools and a share of public offices. Those Republicans who, like Hahn and Cutler, did not immediately respond to these demands were bitterly denounced by the negroes for wishing to get into office by negro votes, while refusing offices to their constituents.

The Democrats were now destitute of hope. It looked as if the State was surely to be handed over to the blacks, registered in large numbers and controlled by radical leaders. The first step, it was believed, would be that bugbear of the South—mixed schools, to be followed, perhaps, by a law authorizing the intermarriage of the two races. To add insult to injury, the negro journal, *The Tribune*,² gloated

¹ *Tribune*, April 14, 1867.

² April 17, 1867.

over the discomfiture of the Democrats, declaring in one of its leading articles that the whites were now subservient to the ex-slaves. "It is certainly a great triumph," it said, "for us to see proud planters, haughty chevaliers, humiliating themselves to the point of flattering their former slaves and crouching to their very feet. The deeper their bow, the more their detestation and desire for revenge are growing in their bosoms." Such utterances, though no facts to support them were given, naturally widened the breach between the two races. They excited all the more indignation because the negro, whatever his acts, was safe from prosecution in the civil courts. Through the action of the civil rights act and the Freedmen's Bureau he was now under the aegis of the Federal government, while the white Democrat felt he had little chance of justice when haled before a military commission or one of the bureau courts,¹ for these courts, intended for the protection of the negro, were now to exercise their jurisdiction at the discretion of the Federal authorities.²

One incident, however, at this time came to gratify the sorely tried Democrats. By order of June 3 Sheridan removed from office Governor Wells, as "an impediment to the faithful execution of the Act of March 2nd," and appointed in his place Thomas J. Durant. On the same day he telegraphed to Secretary Stanton that Wells was a political trickster and a dishonest man, and that his conduct had been "as sinuous as the mark left in the dust by the movement of a snake." As this was also the Democratic estimate of the governor's character, there was no little rejoicing over his downfall, and the *Times* cleverly punned: "All's well that ends *Wells*." Lieutenant-Governor Voorhies, a staunch Democrat, was not disturbed for a year longer. If the

¹ In 1866 the bureau courts had been given up except in parts of Virginia, Louisiana, and Texas. Dunning, *Civil War and Reconstruction*, p. 141.

² The *Times* of April 13, 1867, said, "J. W. Walker, having killed a negro in St. John the Baptist Parish, and the civil authorities having, it is believed, connived at his escape, he will be tried before a military commission in New Orleans."

powers of his office had not been merely nominal, he would have done more to aid the ex-rebels. As much as he could, he exerted himself to mitigate the severity of Reconstruction. For reasons best known to himself, Durant refused to accept the office of governor, and Sheridan appointed B. F. Flanders. His duties, under Sheridan's dictatorship, seem to have been merely nominal. At first Wells refused to vacate his office, and appealed to President Johnson, saying that the quarrel between him and Sheridan was merely personal.¹ Sheridan promptly sent General Forsyth to oust Wells and install Flanders. A week later, Stanbery, attorney-general of the United States, gave his opinion that the commanding general had no right to remove state officials without a trial; but, as we have seen, the supplementary act of July 19 instructed district commanders to pay no attention to the opinions of any civil officers of the United States.

Thus confirmed in his action, Sheridan, on the first of August, dismissed the board of aldermen and assistant aldermen of New Orleans, on the ground that they impeded the execution of the reconstruction acts and had brought the credit of the city into a disorganized condition.² Their places were filled by men some of whom were known to possess business capacity and integrity. Others of the new appointees, however, were negroes—a recognition on Sheridan's part of the colored element in the city which numbered about sixty thousand. In the following September this council appointed four assistant recorders, three of whom were colored, and two city physicians, both of whom were colored.³ Such a departure from the old order of things excited some indignation among the whites, and gratified the blacks proportionately.⁴

On the 17th of August the district commander ordered

¹ It concerned the appointment of levee commissioners.

² There was much fiscal confusion in New Orleans, the city paper money amounting to three and a half million dollars.

³ *Times*, September 12, 1867.

⁴ In spite of disparity in numbers, Sheridan had registered about an equal number of blacks and whites in the city, that is, 14,845 whites, and 14,805 blacks.

that an election should take place on September 27 and 28, to determine whether a constitutional convention should be called. The number of registered voters was declared to be 127,639;¹ and these were to vote on the same date for 98 members to constitute the convention in case the majority of the voters decided that the said convention should be held. It was further provided that to make the election valid, the votes cast must constitute a majority of those registered.

A few days later the New Orleans papers announced that General Sheridan had been relieved from his command by President Johnson, and that his place would be filled by General Winfield S. Hancock.² Before his departure from the fifth district on September 5, Sheridan wrote to Grant that the work of reconstruction in Louisiana had met with no opposition from the people, but was opposed by the press and by office-seekers. As far as the press was concerned, this statement was subsequently denied by the *Picayune* and the *Times*, which declared that they differed from Sheridan, but that they had urged the people to submit. Commenting on his departure, however, the *Republican* said that he ought to have turned out more rebels, and that he had left the city in a deplorable condition, financial, political, and sanitary. The same paper now accused the Democratic papers of keeping severely silent on the subject of voting, while a few months before they had urged their people to register. This accusation seems to have been just. General Wade Hampton, Ben Hill, and other prominent Southerners, seeing how the reconstruction laws were being administered, had already begun to advise opposition to every organization under these laws, and the

¹ Of this number 82,907 were blacks.

² The president's dislike of Sheridan was well known, and his action in this case offended General Grant, who admired Sheridan greatly. As Hancock was in accord with the president's views, his appointment was received in the North with marked disapproval. Hancock did not assume charge until November 29, the temporary appointees being General Charles Griffin, and after his death General Joseph A. Mower.

Democratic newspapers began to hope that enough of those who had registered would stay at home on election day to prevent the Republicans from getting the necessary "majority of registered voters."

The Times of September 1 even ventured to issue a warning to the negroes who, by the enforcement of the reconstruction acts, had now been put in control of the State. "In a few years," it said, "the white vote in the State will more than double that of the colored, and the sins which the colored man now commits against equal rights and manhood suffrage will be remembered against him." The negroes, however, trusting to a continuance of military rule and the supremacy of the Republican party, recked little of such warnings. Their opportunity of obtaining a share in the government and all other rights had come; and whether their old masters were disfranchised or not, they were eager to seize it.

CHAPTER IX.

RESTORATION OF LOUISIANA TO THE UNION.

The election to decide the question of holding a constitutional convention and to choose the delegates for the same took place on the appointed days, September 27 and 28. It passed off quietly except for a small riot in Jefferson City. The negroes, who never before in Louisiana had been legally entitled to vote, came out in large numbers, but the white citizens, especially in New Orleans, generally abstained from voting, with the forlorn hope that this action would defeat the plans of the Republicans, which required the majority of the registered voters to vote. In this they were disappointed. The registered voters, as we have seen, amounted to 127,639, of whom 82,907 were blacks. The vote for the convention was 75,083, with only 4006 against it.¹ Of the 98 delegates elected, 49 were whites and 49 were negroes, a fair division previously agreed upon. All but 2 were Republicans.

On November 23 the convention met in the hall of the Mechanics Institute; but there was no repetition of the scenes which marked the opening of the rump convention of 1866. The Democrats bided their time, hoping that once the State was restored to the Union and the Federal troops were withdrawn, it would be possible for them again to get possession of the government. They little dreamed how long they would have to wait. The assembly was declared by the Republican to be a truly representative body. "The Convention of 1861," it added, "had taken the State out of the Union; this one would restore it." Many of the negro members were free men of color, of better character

¹ The Times claimed that 13,000 voters had been disfranchised by the construction put upon the act of Congress. Cox estimates the number at 40,000. *Three Decades*, p. 547.

and of more intelligence than were to be found in subsequent political bodies in Louisiana; others had once tilled the soil as slaves. As president the convention chose Judge J. G. Taliaferro¹ of Catahoula parish, and then entered upon a session which lasted till March 9 of the following year, nearly three and one half months.

At first there was no great harmony among the delegates. Dr. G. M. Wickliffe, a dentist from Clinton, Louisiana, who had once edited an anti-abolition journal, but who had now swung around and, like most converts, held extreme views, moved in the early days of the convention that all subordinate officers of this assembly should be drawn equally from the two races. This motion was defeated, 47 to 38, by the efforts of the more conservative Republicans, who declared that such action would place race above merit. Equal rights to all (Unionists), with no favoritism even to the negro, was their shibboleth. They were supported by the Republican, which declared Wickliffe to be a demagogue, and condemned him and the organ of the negroes, the *Tribune*, for trying to create distinction between the races. If special favors were granted to negroes because they were negroes, the conservatives of the North would be prejudiced against the constitution about to be framed; and such action might seem to justify the contention of the friends of the administration that Louisiana had become a negro colony, and that the whole South was to be Africanized.

When about this time Ohio voted down a proposition to grant the suffrage to the few negroes in that State,² the Republican enraged the *Tribune* by saying that the defeat of the measure in Ohio was due to the political conduct of the

¹ As Taliaferro had opposed immediate secession in the convention of 1861, the Republican described him now as the old gray-haired Union hero of secession—the one wise man in an age of madness.

² The *Picayune*, December 8, 1867, with evident satisfaction, announced that the three States of Ohio, Kansas, and Minnesota had recently rejected negro suffrage, the vote in Ohio being 255,340 to 215,937; in Kansas, 16,114 to 7591, and in Minnesota 28,759 to 5114. In 1868 Minnesota gave a majority for negro suffrage, but in 1870 the State contained only 246 adult negro men.

enfranchised negroes in Louisiana, and that unless the latter changed their conduct, the Republicans as a party would be defeated and the suffrage of the negroes would be lost.¹ The more radical negroes, however, could not see how their conduct in Louisiana could affect distant Ohio. They knew that they numbered twice as many voters as the whites, and they argued that they should have at least half of the offices. Had not the two races equal representation in the convention? Was not this cry of saving the Republican party merely a skillfully devised excuse for filling all the offices with white Republicans? If this were to be the only result of the disfranchisement of the Democrats and the giving of the ballot to the negro, that is, to hand over the spoils to the Republican whites, the Tribune was prepared to enter a protest. Its attitude might have found favor with those who wished to use the negro vote had not the ablest leader of the colored element in the convention, Pinckney Benton Stewart Pinchback²—himself a chocolate-hued orator of no mean ability, and destined to hold high office in the State—now opposed Wickliffe, and taken sides with the Republican. Offices must be awarded with reference not to race but to education and general ability.

This contention having been settled on safe lines, the convention proceeded to frame such a constitution as would meet with the approval of the dominant party in Congress. It was to be based on the general principle that loyal Republicans should be protected for all time against the ex-rebels, who had tried to break up the Union, and who had not repented of their wicked folly. This view was expressed by the Republican as follows: "As for us, we would rather see another war, another revolution, had rather see every rebel from the Potomac to the Gulf proscribed, disenfranchised, their property confiscated, and every mother's son of them stripped naked and sent out into the world as

¹ Times, October 16, 1867.

² Pinchback was the son of a white man, who had carefully educated him in Cincinnati. He was born in Macon, Georgia, in 1837. In 1867 he was made inspector of customs in New Orleans.

they were born than the right of suffrage taken away from the loyal people of the South.”¹ This journal did not add, but it was clearly understood, that unrepentant rebels, while not permitted to vote or hold office, should be duly taxed for the support of Republican government.

In the meantime, the Tribune continued to air its grievances. The Times, on January 5, 1868, with great gusto, quoted “this organ of the black and tan Convention” as declaring: “The Republican party in Louisiana is headed by men, who for the most part are devoid of honesty and decency, and we think it right that the country should know it. The active portion of the party in Louisiana is composed largely of white adventurers, who are striving to be elected to office by black votes. . . . Some of these intend, if elected, to give a share of office to colored men. We admit that, but they will choose only docile tools, not citizens who have manhood.” “The white adventurers,” or “carpet-baggers,” as they now began to be called by the Democratic papers, did not enjoy these attacks, for such a defection boded ill for their future supremacy. They showed a bitter feeling against Dr. Roudanez, the negro proprietor of the Tribune, for his failure to support the Republican party.²

While this controversy over party loyalty was going on, the convention was discussing the provisions of the new constitution. While so doing, however, it was found necessary to make arrangements for raising a revenue and paying the expenses of the members. The Democratic legislature had adjourned in the preceding March, and as yet there was no Republican legislature to take its place. The state treasury was declared by the governor to be bankrupt; there was no money to pay the state debt or the salaries of the state

¹ Republican, December 3, 1867.

² The Tribune was not a financial success. Roudanez made a public statement saying that he had sunk \$35,500 in the paper in order to keep up an honest organ of the radical party in Louisiana. It was finally suspended in April, 1868. The Tribune seems to have been revived later, for it is mentioned as appearing in 1869 while the committee on Louisiana elections was meeting. 41st Cong., 2d sess., H. Mis. Doc. No. 154, pt. I, p. 768.

officers. The levees were out of repair; many plantations had been overflowed; the negroes were discontented, and unwilling to work in times of such political upheaval; and the crops were almost a failure. Accordingly, the convention whose function was to frame a constitution degenerated for the time being into a legislature, and passed a stringent law laying a tax of one mill on all property for expenses of the convention, with a penalty of twenty-five per cent. for default. It also decreed that warrants issued by the convention to pay the mileage and the per diems of members should be received for taxes.

The Times protested against this assumption of the taxing power, but the state auditor recognized the authority of the convention. It was feared by the conventionists that there would be resistance to the payment of this tax, and that General Hancock, who had taken command of the fifth district on November 29, and who had already shown a strong leaning toward the president's interpretation of the reconstruction acts, might support the resistance. The commanding general, who had restored some officials removed by his predecessor, General Mower, and who had revoked Sheridan's order permitting negroes, contrary to state law, to sit on juries,¹ now announced that in civil cases the administration of justice belonged to the regular courts, and not to the commanding general. "Arbitrary power," he added, "such as I have been urged to assume, has no existence here. It is not found in the Laws of Louisiana or of Texas; it cannot be derived from any acts of Congress; it is restrained by a Constitution, and prohibited from action in many particulars." While disclaiming judicial functions in civil cases, however, Hancock added that it would be improper for him to anticipate any illegal interference on the part of the courts, but that whenever a case arose for the interposition of the powers vested in him by the acts of

¹ In the United States district court Judge Durell decided that his juries should be drawn without distinction of color, but in the state courts Judge W. W. Howe, a prominent Republican, sided with Hancock.

Congress, he would preserve law and order. This Delphic utterance left the convention in some doubt as to its position; and on January 9 Judge Taliaferro told the convention that unless Hancock would prevent the interference of the courts, the mill tax could not be collected. This fear, however, was groundless, and though the tax was collected with some difficulty, there seems to have been no actual resistance.

On March 9, 1868, the convention, having completed the constitution, adjourned. The Rev. Josiah Fisk, who was invited to close the proceedings with prayer, pleased his hearers with a quasi-political invocation, saying, among other things: "Bless the President of these United States. Enable him to pause in his career of vice and folly. May he cease from doing evil, and learn to do right!" The constitution on which Fisk called down the blessing of heaven, though it was longer by six pages than that of 1864, filled only about twenty-seven pages—just half the length of the organic law which closed the period of reconstruction in 1879. The chief provisions which differentiated it from the constitution of 1864 were as follows.

First, as it was intended to furnish to the negro that equality with the loyal whites which the organic law of 1864 had fought shy of, it recited portions of the Declaration of Independence, with slight modifications of language suitable to the existing circumstances, and with a practical application of principles which would have shocked the author of that immortal document. Thus, after declaring that "all men are created free and equal," the constitution provided that all persons should enjoy equal rights and privileges upon any conveyance of a public character. All places of business or of public entertainment, or for which any license is required, should be deemed places of a public character, and should be opened to the accommodation and patronage of all persons without discrimination on account of race or color. This article, proposed by Pinchback, was adopted by a vote of 58 to 16.

Second, in order to prevent future secession, it was provided that all persons born or naturalized in the United States and resident for one year in Louisiana were citizens of the State, and that allegiance to the United States was paramount to the allegiance owed to the State.

Third, representation in both houses was to be in proportion to the total population, instead of in proportion to the number of qualified voters, as in 1864.

Fourth, no public schools or institutions of learning should be established exclusively for any race. By a special clause, the University of Louisiana, in all its departments, was thrown open to both races.

Fifth, and most important of all, was the new suffrage law, the most stringent, perhaps, in its disfranchising clauses to be found in the constitutions of all the Southern States.¹ It permitted every adult male citizen of the United States, resident in Louisiana for one year, to vote, except (a) persons convicted of crime or under interdict; (b) those who had held any office for one year or more under the so-called Confederate States; (c) registered enemies of the United States; (d) leaders of guerilla bands during the rebellion; (e) those who, in the advocacy of treason, wrote or published newspaper articles or preached sermons during the rebellion; (f) those who voted for or signed the ordinance of secession in any State. As a premium on perjury, it was added that no one thus excepted should vote or hold office in the State until he signed a certificate acknowledging the rebellion to have been morally and politically wrong and that he regretted any aid or comfort given thereto. He could be excused, however, from furnishing this certificate if, prior to January 1, 1868, he had favored the execution of the reconstruction acts, and openly and actively assisted the loyal men of the State in their efforts to restore Louisiana to her place in the Union. This severe measure, which seemed to disfranchise certain classes of unrepentant rebels forever, was passed by a vote of 44 to 30. A number

¹ Dunning, *Civil War and Reconstruction*, p. 197.

of negroes voted against it; among others, Pinchback, who said that he did so because he firmly believed that two thirds of the colored men of the State did not desire disfranchisement to such an extent.¹ Somewhat later he signed the constitution, but, with three other members, filed a protest against this clause, saying, "We are now, and ever have been, advocates of universal suffrage, it being one of the fundamental principles of the Radical Republican party."² Verily, the radicals were out-heroding Herod.

Sixth, an oath was prescribed, even for members of the legislature, that they should accept the civil and political equality of all men, and should agree not to attempt to deprive any person of such equality on account of race, color, etc.

Seventh, all the labor laws passed by the Democratic legislature of 1865 were declared to be null and void.

Eighth, in case the constitution was not adopted, the convention might be recalled by a majority of the members. The constitution was finally signed by eighty-five members. Several members were absent, and five who were present³ refused to attach their signatures, chiefly because of the disfranchising and civil rights clauses.

The days appointed for taking the popular vote on the constitution were April 16 and 17, 1868. Before these dates came around, however, General Hancock, who had won great popularity among the Democrats by his conservative course, was removed from office at his own request. The occasion was this: he had removed a city recorder, and when the city council provided for the election of another, he removed those who had so voted—two whites and seven negroes. General Grant was applied to, and as he resented the president's removal of Sheridan and the appointment of Hancock, he now suspended Hancock's order, asked for a full report, and finally restored the deposed members. Whereupon General Hancock, feeling that he could no

¹ Journal of Convention, 1867-8, p. 259.

² Journal of Convention, 1867-8, p. 293.

³ These were Cooley, Crawford, Dearing, Ferguson, and Harrison.

longer occupy his position with dignity, asked to be relieved.¹ His request was granted, and General J. J. Reynolds took his place for a few days. Reynolds's successor was Major-General R. C. Buchanan, who had been an assistant commissioner of the Freedmen's Bureau. Verily the road to reconstruction which the State had to travel was hard and uncertain. The uncompromising and radical Sheridan had been removed by Johnson; the liberal and magnanimous Hancock was persona non grata to Grant. Government from a distance is generally bad government, and especially bad when no consistent policy is followed.

Louisiana, which in the eyes of Congress had not been restored to her proper relations with the Union, was now to have the remarkable experience of voting for state officers on the same days on which she voted for or against a constitution the acceptance of which by Congress was to restore her to a place in the Union. But Congress was in a hurry, and there was nothing to do but to submit to the anomaly. To facilitate matters still more, General Buchanan, on March 25, 1868, issued an order that a recent act of Congress (of March 12) should apply in the approaching election, namely, that the said election should be decided by the majority of the votes cast, without reference to the number registered.² He also ordered that no negroes should be discharged for voting the Republican ticket, and that all unfairness at the polls would be prevented by the presence of the military. The election passed off quietly. The constitution was ratified by a vote of 51,737 to 39,076. At the same time, H. C. Warmoth, who had claimed an election as delegate from the territory of Louisiana in 1865, was chosen governor over J. G. Taliaferro by a vote of 64,941

The Times fully approved the course of Hancock, but in January, 1868, forty-three members of the convention had signed a petition asking Congress to remove him as an "impediment to reconstruction."

² This was to prevent the stay-at-homes from defeating the constitution as had happened in Alabama on February 4. Congress made the act of March 11 retroactive, and held that the constitution of Alabama was legally ratified. Burgess, *Reconstruction and the Constitution*, p. 153.

to 38,046.¹ The other officers of the State were: lieutenant-governor, Oscar J. Dunn (colored); secretary of state, George E. Bovee; attorney-general, Simeon Belden; auditor, G. M. Wickliffe; treasurer, Antoine Dubuclet; and superintendent of education, Rev. T. W. Conway.

In the neighboring State of Mississippi, two months later, the Democrats were so well organized, and persuaded so large a number of negroes to vote against the reconstruction constitution, that they succeeded in defeating the adoption of that instrument by a vote of 7629. In Louisiana, however, at the spring election, the Democrats discussed the matter, and concluded that it would not be worth while to nominate a full state ticket in opposition to the two Republican factions, though they managed to elect a minority of the members of the General Assembly. In New Orleans, moreover, J. W. Conway, a Democrat, was elected mayor. The incumbent, Heath, denied that municipal elections were authorized by the election ordinance of the constitution, and refused to yield the office to Conway. He was promptly arrested by General Buchanan, and compelled to surrender the keys. He then brought an action of quo warranto against Conway. It was of no effect. General Grant having approved Buchanan's action, the court was informed that a decision in favor of the plaintiff would be of no avail, and proceedings on the case were dropped.

General Buchanan now proposed to withhold his consent to the meeting of the legislature until the new constitution had been accepted by Congress. On the 25th of June, however, Congress passed an act admitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation, in view of the fact that they had framed and adopted "Constitutions of State Governments which

¹ Albert Voorhies, Democratic lieutenant-governor of the State since 1866, was succeeded by a negro house-painter, Oscar J. Dunn. B. F. Flanders, appointed governor by Sheridan, had resigned on January 2, 1868, and had been succeeded by Joshua Baker, a Union man from Attakapas, who now gave place to Warmoth.

are republican."¹ In accordance with the orders from General Grant, Buchanan now removed Governor Baker and Lieutenant-Governor Voorhies, and placed in office H. C. Warmoth and Oscar J. Dunn.

Two days later, June 29, 1868, the new legislature met in New Orleans. About one half the members were negroes; the Republicans had a majority of 20 to 16 in the senate and 56 to 45 in the lower house. At the organization of the two houses an effort was made to exclude most of the Democrats by forcing them to subscribe to the iron-clad oath of 1862,² as well as to the oath required of members of the General Assembly as laid down in the constitution just adopted. This position was taken by the president of the senate, Oscar J. Dunn, and by the temporary chairman of the lower house, R. H. Isabelle, who, like Dunn, was a negro. They explained their attitude by declaring that the State being still under military law as well as under reconstruction laws, they deemed it necessary for members to take both the test oath and the oath of the new constitution. This action of the presiding officers caused great indignation among the Democratic members,³ partly because it was the attitude of two negroes at the time when their race had just been raised to high office in the State, and partly because General Grant, who had been telegraphed to a few days before for a decision on the question, had informed Dunn through General Buchanan that only the oath of 1868

¹ Tennessee and Arkansas had already been admitted. Texas, Mississippi, and Virginia were still "without." In discussing the admission act of June 25, Burgess says: "It was utter self-stultification for Congress to take the ground that the Johnson 'State' Governments were unrepubli- can because they did not enfranchise all adult males of whatever race, color, . . . and then proceed to create new 'State' governments in their places upon the basis of a minority of the already duly qualified and registered voters." It was "a high political crime." Reconstruction and the Constitution, p. 154.

² This oath required of persons accepting office under the United States government that they should swear that they had never borne arms against the United States, aided its enemies, or supported the Confederacy.

³ The Picayune criticised Dunn's action as "grotesquely impudent and exquisitely absurd."

should be required. When Dunn showed a disposition to reject Grant's view of the matter, a great crowd assembled once more around the doors of the Mechanics Institute to insist on the admission of the Democrats; and for a time it looked as if the scenes of July, 1866, were to be reenacted. The whole police force, with a regiment of artillery, was called out to prevent disorder. Luckily the General Assembly reconsidered its illegal action, and, "induced by a due respect for the General commanding the armies of the United States," decided to admit the Democratic members under the milder oath. The incident, however, was a bad augury for the future relations between the two races. It showed a disposition on the part of the negroes and their white allies to adopt a more radical platform in their treatment of the whites than General Grant himself would authorize, and forecasted a determination to legislate wholly with reference to their own interests.

The first act of the legislature was to pass the fourteenth amendment as required in the act of reconstruction. The next was to seek representation in Congress by the election of two senators. Accordingly, William Pitt Kellogg and John S. Harris were elected, and took their seats on July 18, 1868.¹ They were the first senators admitted from Louisiana since John Slidell and Judah P. Benjamin resigned in 1861. As soon as he was inaugurated, Warmoth informed General Buchanan of the ratification of the fourteenth amendment, and that officer immediately gave orders declaring that military law no longer existed in Louisiana; the civil law was once more supreme. All civil officers acting under authority from military headquarters were ordered to transfer their offices, with the records of the same, to their duly elected successors. The military forces, however, were not withdrawn from the State, but were to stand ready to preserve the peace whenever proper application was made by the civil authorities, or whenever so ordered by the commanding general.

¹ The representatives to the lower house of Congress now admitted were J. Hale Sypher, J. H. Menard (colored), Michael Vidal, John P. Newsham, and W. Jasper Blackburn.

CHAPTER X.

PARTY ORGANIZATION.

Louisiana now seemed to be in a state of peace and order, but it was only the calm which precedes the storm. The anomalous condition of political affairs could not continue; friction between the property owners and the irresponsible legislature was sure to come. Warmoth knew this, and his only hope was to keep enough of the Federal troops at hand to support him in his precarious position. It was not to be expected that the conduct of the Democrats, especially in those country parishes where the negroes were in the great majority, would be so circumspect as not to give the radicals many an opportunity to appeal to the Federal government for aid in keeping down Democrats and guaranteeing "life, liberty, and the pursuit of happiness" to white and black Republicans. Moreover, the order of the Knights of the White Camelia, which had been established in Louisiana during the preceding year, was now to be organized in a thorough manner, and was to spread over the whole southern part of the State. Its history will be given later.

When Warmoth's inaugural message appeared, it was approved by the Democratic papers as conservative in character and more moderate in tone than could have been expected. It naturally declared for "equality before the law and enjoyment of every political right by all citizens, regardless of race or previous condition." It added, however, with a cautious forecast of the future, that while the majority had adopted the constitution, there was still "a minority not wanting in intelligence and virtue that was opposed to such equality." "So let our course be moderate and discreet," argued the governor; "it is better that our legislation should fall behind than outstrip the popular wishes and demands. Let us try to bring back the era of good feeling.

I believe this epoch has the smiles of Providence. Cursed for sins with war, scourged with epidemic, our crops blighted for a succession of years; our fair State overflowed by the torrents of the Mississippi; commerce paralyzed and people impoverished; the event of my inauguration is welcomed by the full restoration of civil government and re-admission into the Union, the fairest prospects of crops, receding floods, and improving credit. Let us vie with each other in seeing who of us shall receive most blessings for good and faithful services rendered the State."

The approval of the governor's attitude, however, did not last long. Some lawlessness began to crop out in the country parishes as the result of the strained relations between the races, or perhaps as a natural result of the political upheaval. The *Picayune* maintained that the lawbreakers were deserters from the Confederate army, or jayhawkers, now pretending to be Union men. The governor sent a report to President Johnson declaring that one hundred and fifty men had been murdered in Louisiana in six weeks; a statement which the *Picayune* promptly pronounced to be false. The outrages, it said, of which Warmoth wrote really numbered only three, and these were personal, not political.¹ Senator Jewell, a Democrat from Orleans, attacked Warmoth's character in the legislature, saying that he had been sent out of Vicksburg by Grant for conduct unbecoming an officer and a gentleman, and dismissed from the staff of General Banks for non-observance of the truth, and that he had now set himself up in Louisiana as a dictator and a maligner of the best portion of the people. Jewell was answered by a Republican, who said that these charges were but the shafts of malice.²

¹ Forty-two officers of the Freedmen's Bureau reported only fourteen deaths, black and white, in the parishes included in Warmoth's report. *Picayune*, August 8, 1868.

² Henry Clay Warmoth was at this time twenty-six years old. He was born in McLeansboro, Illinois, May 9, 1842. He was admitted to the bar in 1861, and became district attorney of a judicial district of Missouri in 1862; but resigned to enter the army. He was appointed lieutenant-colonel, and took part in the assaults on Vicksburg in May, 1862. He was for a time judge of the military court

In the General Assembly some attempts were made to pass laws which lacked the moderation advocated in the governor's inaugural. For instance, in July there was pending in the senate a printing bill providing for the payment of certain items at a price six times greater than had ever been paid before for similar work. This bill was so bad that a Republican senator of full African blood, from Lafourche, spoke against it, and the price was reduced. Worse, however, than any form of plunder was the threat of "mixed schools," a measure which in Louisiana, as in other Southern States, was regarded as the opening wedge to social equality, and hence as a dire insult to the old aristocratic population. On August 11 the Picayune announced that T. W. Conway,¹ the state superintendent of education, who was known to be a fanatic on this subject and had proved himself to be a meddlesome political agitator, had drawn up a bill to be submitted to the legislature. This bill, carrying out a provision of the new constitution, placed under state control all institutions established by the State or incorporated by the legislature, and declared that children of all colors between the ages of six and twenty-one were to be admitted to the public schools. But for fear that this mingling of the two races might be obviated by the refusal of the whites to allow their children to attend "mixed" schools, the bill further provided that "all children between eight and fourteen years, shall attend school at least six months in each year; and if the parents or guardians, on being admonished, do not cause them so to attend, a justice of the peace may fine them to the extent of \$25 for the first offence, and \$50 for subsequent ones; and after three such admonitions, the State board is authorized to

of the Department of the Gulf. Judge Howe informs me that Warmoth claimed that he was dismissed from the army when he was very young because he made a speech criticising General Grant for his treatment of General McClellan. After a visit to Washington, however, Warmoth was reinstated. Judge Howe says also that Pinchback was a professional gambler, used to get drunk, and was a rascal generally.

¹T. W. Conway was an ex-army chaplain, and is not to be confounded with J. R. Conway, mayor of New Orleans.

take such children or wards and give them instruction at least five months in each year, in such school or place of correction as shall be provided by the board for that purpose, at the expense of the parents, if they are able to bear it." The *Picayune* predicted that if this bill with its drastic compulsory feature passed, it would stir up civil war. Perhaps as a result of this prediction, the bill did not become a law; and when in the following year it was passed, it was shorn of its compulsory provision. The bare threat of compulsory mixed schools, however, showed the animus of the radicals in the legislature, and aroused intense antagonism toward men of the type of Conway and Pitkin, who seemed to long for the day when white and black children should sit on the same school bench.

In September both houses of the General Assembly passed a "social equality bill" punishing by a fine of not less than one hundred dollars any hotel keeper, steamboat master, and the like who should refuse to give equal accommodations to whites and blacks; but the bill was promptly vetoed by the governor on the ground that a law of this nature would really injure the cause of the negro. The veto was sustained in the lower house, and Warmoth was publicly thanked for his action by the *Picayune*.¹

There was great dissatisfaction, however, over an act of the legislature authorizing the governor to appoint five police commissioners for New Orleans, Jefferson City, and St. Bernard parish. These commissioners, three of whom were negroes, were vested with large powers; and they soon contrived to make the so-called "Metropolitan Police Bill" a most unpopular measure. They were empowered to appoint or remove the police force of the city, to assess the various municipal corporations for the sums necessary to

¹ *Picayune*, September 29, 1868. Pinchback had opposed the civil rights provision in the constitutional convention when it was first proposed, saying: "Social equality, like water, must be left to find its own level, and no legislation can affect it. Any attempt to legislate on it will be the death blow of our people. The national civil rights bill is imperative." For some reason, however, Pinchback changed his mind, and the provision on this subject finally adopted in the constitution was proposed by him.

carry out the law, to lease and purchase property for the purposes of the bill, and to pass enactments pertaining to its functions.¹ The city council, having decided that this act was illegal and that the police appointed under it were incapable, organized the police under the old law, but General Steedman, superintendent of the police force, refused to allow the authority of the commissioners to be superseded.² Finally, on October 28, the governor wrote to General L. H. Rousseau,³ the commanding general, that, Congress having prohibited the organization of the militia in Louisiana, he required him to keep the peace in Orleans, Jefferson, and St. Bernard.⁴ Rousseau agreed to support the police force organized under General Steedman.

On November 4 the election for presidential electors took place. In order to understand the success of the Democrats in that election it will be necessary to review briefly the organization of the party during the spring and summer preceding. Encouraged by the fact that Hancock had shown himself favorable to fair treatment of the Democrats, and by the fact that the Tribune, the negro organ, had refused to support Warmoth for governor, the Democrats began to bestir themselves in the early spring. At first it was proposed to put up a state ticket in opposition to Warmoth and Taliaferro, but the Democratic leaders decided that it was not worth while. If, they said, the constitution is defeated, there will be no offices to fill; if it is ratified, the Republicans will naturally elect their candidates.⁵

¹ Picayune, August 19, 1868.

² Annual Cyclopaedia, 1868, subject "Louisiana," p. 440.

³ General Rousseau had supplanted Buchanan, September 15.

⁴ Picayune, October 28, 1868. The Democrats offered to make Steedman superintendent of the new police bill, but he refused to accept, though he was a Democrat. By an act of March 5, 1869, the mayor of New Orleans was made dependent entirely on the metropolitan police. Acts of Legislature, 1869, p. 61. The same year the Metropolitan Police bill was amended and reenacted, *ibid.*, p. 92. This quarrel over police was explained before the committee on Louisiana elections, 41st Cong., 2d sess., H. Mis. Doc. No. 154, pt. I, p. 760.

⁵ This policy was not followed by Mississippi, which in the following June had the ephemeral satisfaction of defeating both the radical state ticket and the constitution. The victory, however, only deferred for a year the reconstruction of the State.

So Colonel T. L. Macon, chairman of the central Democratic committee, advised that only local nominations be made for Congress, parish offices, the legislature, and the bench. Between the two gubernatorial candidates, Warmoth, "the adventurer," and Taliaferro, an honest Union citizen of Louisiana, he advised the conservatives who cared to vote to support Taliaferro. How many of them did so is not known.

While, however, no attempt was made to carry the gubernatorial election, the Democrats decided to organize and to try to carry the State for Democracy in the presidential election to be held in November. Resolutions were adopted declaring that the people of Louisiana were threatened with the consummation of a policy involving their degradation and ruin, promising the destruction of their material interests with the overthrow of all constitutional safeguards, and aiming at the perversion of every social, educational, and governmental institution. The organization of the party effected during the summer of 1868 was the most thorough that the State has ever seen. Old Democrats now living still speak with admiration and pride of the work accomplished at that time. One of the leaders has told the writer that before the summer was over he could sit in his office in New Orleans and in twenty minutes he could assemble three thousand Democrats on Canal Street.

The Republicans maintained that every negro was naturally a Republican, and could become a Democrat only through intimidation or violence. This theory turned out to be false. Doubtless many negroes did change sides as the result of intimidation and violence; for the Democrats, where it was safe, did not hesitate to use these weapons. But if the newspapers of the time and living witnesses may be believed, a large number of negroes, having no political convictions, and being densely ignorant, were easily organized into Democratic clubs.¹ Others, more intelligent, were

¹ For instance, James A. Pugh, of Morehouse, testified that a negro said to him: "We are all democrats; we have been deceived

unwilling to become the tools of Republican adventurers from the North seeking office through the negro vote, and refused to array themselves against the property owners of the State. Certainly the Democrats had no difficulty in obtaining negro political speakers to address meetings of their own people, though such speakers were often exposed to violence and were denounced by the radicals as "Judases, Cains, Benedict Arnolds, and traitors to their race."¹ One negro driving a carriage in a Democratic procession was actually killed.

In the month of May the Picayune urged the Democrats to lose no opportunity to win over the blacks. It commended heartily the people of Caddo parish, who had helped the anti-radical negroes to form a club, had promised to protect the club from radical violence, and had offered to give the members preference in employment and advice in perplexities.² The Opelousas Courier criticized the Picayune for wanting to induce negroes to join Democratic clubs; as for itself, it did not want negro suffrage in any shape, for or against the Democrats. The Picayune, however, insisted that the industrious negroes could and should be induced to abandon the radical party. "We don't blame," it said, "those negroes who vote the Republican ticket: 'they know not what they do.'"

The policy of the Picayune found favor. In New Orleans at least one colored club—called the "Constitution

by the radical party; I have strained these old eyes of mine nearly out looking down the road for the drove of mules that were to be divided amongst us. We were promised forty acres of land and a mule and three hundred dollars if we would vote for the convention. We did it, but the mules have not come, and now we are democrats, and do not want to vote the radical ticket." Report on Contested Elections, pt. I, p. 292.

¹ Picayune, September 11, 1868.

² In Rapides parish planters held a meeting and resolved: "We will ever hold in high esteem the freedmen among us who came out boldly in the recent political excitement, and ranged themselves on our side, and when we have favor to render they shall not be forgotten." Report on Contested Elections, pt. II, p. 149. Wm. Norman (colored) testified, "I think it was the kindness of the whites toward the colored people that made them vote the democratic ticket." Ibid., p. 177.

Club No. 1"—paraded the streets. Moreover, colored orators, who had joined the Democratic party, were promptly enlisted as speakers to convert their brethren to Democratic principles. Some of them spoke from the same platforms as the white orators. The white radicals were enraged at this successful attempt to split the African vote, supposedly solid for them; and when Willis Rollins, a loud-mouthed negro orator from one of the country parishes, was brought to New Orleans and began to make violent speeches against the radicals, his life was in danger. There was a riot on Canal Street, and some three hundred black and white radicals, catching sight of Rollins, fell upon him and beat him until he was rescued by some friendly Democrats. When the frightened darky had been hurried off to the police station for safety, Governor Warmoth addressed the mob on Canal Street, and counselling moderation and the privilege of free speech for all, persuaded them to disperse. A week later, Rollins, with several other negroes, addressed a crowded meeting in Lafayette Square; but while he had a marvellous flow of language, what he said was for the most part abusive nonsense, and the Democratic leaders concluded that though the negroes were flattered to see one of their own race on the same platform with "white folks," his speeches really did more harm than good.¹ The Democratic cause was really aided, however, by the defection of a negro preacher in the adjoining State of Mississippi. In August this man published a statement in which he said, "I leave the Republican party, believing it to be ruinous to the Union, an enemy to the black race, and the upbuilder of tyranny in our beloved Union." This statement, published in the New Orleans papers, may well have influenced those of the blacks who were wavering in their allegiance to their northern friends.

The Tribune, as we have seen,² disappointed at the non-recognition of the best class of negroes, or at least asserting

¹ Personal testimony of Col. T. L. Macon.

² Page 196.

this as a grievance, inveighed against the Republican leaders in Louisiana as "devoid of honesty and decency." But the Tribune, of course, had no intention at the time of deserting the Republican ranks; it was simply attacking the radical faction. Many of the negroes, however, were too ignorant to make distinctions; and, dissatisfied with the party in power, they believed that there was little hope from the Republicans, and that the Democrats, in recognition of negro aid at the ballot box, would give the negro a fair chance. They listened to able addresses from men like General J. B. Steedman, the Federal collector of internal revenue in New Orleans, who, though a Democrat, won the confidence of the colored voters by telling them that he had served in the Federal army and had commanded five thousand negro troops at Nashville. Steedman told them frankly that if a Democratic president was elected, the question of negro suffrage would probably be decided by a vote of the entire people, or perhaps by a decision of the Supreme Court. If negro suffrage was decided to be constitutional, he said, he did not believe a respectable man in Louisiana would attempt to deprive the negro of his vote. At the same time he told the negroes that the radicals were using them as tools with which to get into office, and cared nothing for their general welfare. Steedman could also point to the fact that General Rousseau, the commanding general of the department, was a Democrat, and that there was in New Orleans a Democratic club of ex-Federal soldiers and army and navy officers numbering more than two hundred members.¹

The Democrats, however, were well aware that to obtain a victory in November for Seymour and Blair they could not depend on gentle suasion. They remembered that in the preceding spring the radicals had adopted the constitution by a vote of 51,737 to 39,076. If they would change the minority into a majority, they must register a large

¹ Report on Contested Elections, pt. II, pp. 756-768. Steedman's testimony is very enlightening.

number of Democrats, and at the same time intimidate as many negroes as possible to vote the Democratic ticket or to remain away from the polls. As far as possible no intimidation was to be used, for they knew that the state administration, if defeated, would be only too happy to raise the cry of fraud, and to persuade Congress to reverse the returns.

The whole State was alive to the issue, and for some months before the election the Democrats seem to have been confident of victory. New Orleans teemed with political clubs, both Democratic and Republican. Among the most conspicuous Democratic organizations were the Seymour Tigers, the Swamp Fox Rangers, the Seymour Infantas, and the Innocents. This last-named association, whose name was supposed to be derived from that of a republican club in Sicily, numbered twelve hundred members, a mixed crowd of Spaniards, Italians, Sicilians, Portuguese, Maltese, and Americans. The radicals declared that many outrages were committed by these "Sicilian cut-throats," and that they had instituted a reign of terror in St. Bernard parish. Certainly there was almost sure to be a fracas whenever they paraded in New Orleans.¹ They sallied forth from the Orleans Ball Room, where it was said they would consume a hogshead of wine and innumerable cigars. The radical clubs were equally active in parading the streets, and it was reported that the leader of a negro Republican club was heard to say that he wanted nothing better than to meet a Democratic parade; "he would bore right in." Every effort was made by the radicals to encourage the negroes to claim full equality with the whites—both political and social. Campaign documents were sent down from the North to incite the negroes to vote the Republican ticket. Some of these were illustrated, and contained easy catechisms for

¹ General Hatch, assistant commissioner of the Freedmen's Bureau, reported that during one month, in the parishes adjacent to New Orleans, there were two hundred and ninety-seven negroes killed, fifty wounded, and one hundred and forty-two maltreated. Report on Contested Elections, pt. I, p. 32.

the darkies, thus: "Who set you free?" "The Radicals." "Who fought the battles of Slavery?" "The Democrats." Social equality was advocated from the stump. An orator named Vidal in one of the country parishes was heard declaring to a crowd of negroes that he was "raised" in France, where social equality of races existed. He told the negresses present that in that country they would be received like white women. He added that as the negroes were in the majority in Louisiana, they should control everything.¹

A potent factor in the organization of the Democratic party in Louisiana was the secret association. In 1867-8 an association called the "Knights of the White Camelia" sprang up like magic in southern Louisiana, whence it spread under the same or similar names through Alabama and other neighboring States. It attracted numbers by its secrecy and held them by a binding oath. Its cardinal doctrines were white supremacy and opposition to every effort of the radicals directed toward miscegenation. While its adherents vehemently denied that it was political in character and even voted down on one occasion a proposal to make it such, its opposition to negro rule naturally took a quasi-political character, and helped to consolidate the ranks of the Democratic party.

In Franklin, St. Mary's parish, it was organized as the White Man's or Caucasian Club as early as May 22, 1867. Its founder, it is said, was Judge Alcibiade de Blanc, of that parish. In New Orleans, which was to be the headquarters of the association, its formal organization dated from May 23, 1867, but there was no convention of the order in that city until 1868. Then the Federal organization was completed, a constitution was framed, and the knights began to extend their influence throughout the other Southern States.² The preamble of their manual de-

¹ Report on Contested Elections, pt. II, p. 51.

² See for the rise of the Knights of the White Camelia, Fleming, *Documentary History of Reconstruction*, II, 349 ff., and Brown, *The Lower South*, pp. 209-10.

clares that "there is a fact which stands beyond denial—it is that the Radical Party, the freedmen, and the colored population of the whole republic have coalesced against the white race."

The ceremonial provided for the introduction of members into the association was as elaborate as those in use among the Greek-letter societies of our colleges. The novitiate was required to swear a solemn oath that at all times he would maintain and defend the superiority of the white race on this continent, and at all times observe a marked difference between the white and the negro or African race; that he would do all in his power to prevent the political affairs of this country, in whole or in part, from passing into the hands of the negro or other inferior race; that he would never fail to cast his vote against a person opposed to these principles who might be a candidate for any office; that he would never marry any woman not belonging to the white race; that he would obey the orders of those who by the statutes of the society had the right to give orders; that he would, at all times, even at the peril of his life, respond to a sign of distress or cry of alarm coming from any fellow member of the order; that he would defend or protect them, and do all in his power to assist them through life; that he would never reveal to any one without authority the existence of the order, its signs of recognition, its pass words, its signals of alarm, or the names of its members; that he would cherish the principles of the order, and use his influence and power to instil them in the hearts of others. When this oath had been duly sworn, the grand commander said, "By virtue of the power in me vested, I now pronounce you 'Knight of the White Camelia.'" Following this ceremonial, the knight was instructed in the signs of the order. The sign of recognition was made by carelessly drawing the index finger of the left hand across the left eye. The signal given by a knight in distress was "ih! ih!" The signal of alarm was four knocks—first, one; then two, rapidly; and then one.¹ The

¹ Report on Contested Elections, pt. II, pp. 402 ff.

questions and answers to insure recognition were as follows:
 Q. "Where were you born?" A. "On Mount Caucasus."
 Q. "Are you free?" A. "I am." Q. "Were your ancestors free?" A. "They were." Q. "Are you attached to any order?" A. "I am." Q. "To what order?" A. "To the Order of the White Camelia." Q. "Where does it grow?" A. "On Mount Caucasus."

The leading men of the State very generally joined this order, though the principles which it inculcated were already so deeply implanted in the breasts of the southern whites that it seems useless to have framed them into a constitution. In fact, one of the knights afterwards testified before a congressional committee that such an organization was both useless and absurd.¹ However, at the time the object of the order was very generally interpreted by the members to be the securing of white supremacy by an appeal to race pride. It was a protest against social equality and miscegenation as taught by the radicals in the North and as embodied in some of their legislative acts in the South. The social and the political are so closely connected that such an organization, as was said above, could not but help to strengthen the ranks of the Democratic party.² While it did not attempt to defraud the negro of his ballot,³ its members were constantly warned that negro clubs had been formed all over the South by the radicals in open and sworn hostility to the whites, and that those negroes who

¹ Testimony of J. H. Boatner. Report on Contested Elections, pt. I, p. 290.

² The chief of the knights in Alabama told W. G. Brown that no act of violence was committed by his circle, but they sent out silent squads to intimidate negroes and carpet-baggers. Lower South, p. 213. The writer cannot discover that the association in Louisiana, as such, took any part in politics.

³ Colonel Zacharie says that spies got into the order in New Orleans, and that little or nothing was done there by the Knights of the White Camelia. This is true, for Warmoth states that he had detectives who were members of the Knights of the White Camelia in good standing, and who gave him information. One was an ex-officer in the United States army. Report on Contested Elections, pt. II, pp. 454, 527, 529.

had remained true to the whites should be generously dealt with and kindly remembered.¹

It was but natural, also, that the widespread organization known as the Ku Klux Klan, which had been established first in Tennessee in 1866, should extend its operations to Louisiana. The Ku Klux was quite distinct in its methods, if not in its objects, from the Knights of the White Camelia, and the latter generally denied that the Klan existed in Louisiana. It seems true that as an organization it did not exist, but the testimony of many witnesses shows that reckless bands of whites did disguise themselves, and, adopting the methods of the order as it existed in other States, did range some of the country parishes at night, intimidating the ignorant, superstitious darkies, and endeavoring to frighten away the more extreme of the radical whites.

The aim of the Ku Klux, like that of the Knights of the White Camelia, was to maintain white supremacy and to resist with all their might the influence of the Loyal League, by which, as we have seen, the negroes were held under strict discipline and sworn to vote the radical ticket.² As the Loyal League had its constitution, its ritual, its catechism, so had the Ku Klux Klan. This remarkable organization had its first home in Pulaski, Tennessee, where it was formed in 1866 by a band of young men who had served to-

¹ The congressional committeemen sometimes amused themselves by asking ignorant negroes about the Knights of the White Camelia. A Democratic negro named Everett was questioned as follows:—

Q. "Are you a member of the Knights of the White Camelia?"

A. "I don't understand that name."

Q. "You know what a Camelia is, don't you?"

A. "No, sir."

Q. "Did you ever see a flower called the White Camelia?"

A. "I don't know what kind of word that is. I knew a girl of that name once. That is, she was 'Melia'."

Q. "But she was a black Camelia, wasn't she?"

A. "No, sir, pretty near white."

² The Union League, according to Professor Fleming, was largely responsible for creating the conditions which led to the Ku Klux movement, and the Klan had much to do with the breaking up of the organization of the League. Documentary History of Reconstruction, II, 4.

gether in the Confederate army.¹ Its original object seems to have been social rather than political; it resembled a college fraternity, with initiation ceremonies and good fellowship. The order became so popular that it spread into other Southern States, where branch dens were established with more or less connection with the headquarters in Tennessee. Its very secrecy exercised a charm over its members. As the Union League began to spread through the South, and it became necessary to control thieving freedmen and their associates the carpet-baggers, the order changed from a social club to a vigilance committee, or band of "regulators." It soon absorbed the patrols who had been so commonly employed in the South to keep the negroes in order on the plantations.

In the spring of 1867 the various "dens" were requested to send delegates to a convention in Nashville, Tennessee. Here a constitution was drawn up which provided for a central administration and supervision over subordinate "dens." This "prescript," as it was termed, did not state the objects of the order, but was simply designed to bring all branches into better discipline and to prevent the disorder and violence to which such an association was liable. In 1869 a revised constitution was issued in which the principles of the order were clearly stated. The Klan was declared to be "an institution of chivalry, humanity, mercy, and patriotism." Its objects were declared to be (a) to protect the weak, the innocent, and the defenceless from the wrongs and outrages of the lawless, the violent, and the brutal; (b) to defend the Constitution of the United States and all laws passed in conformity with it; (c) to aid in the execution of all constitutional laws, and to protect the people from unlawful seizure and from trial except by their peers and the law of the land. The accompanying creed

¹ Thomas Dixon is doubtless right in saying that the name was derived from "*Kuklos*" (Gr. *Circle*), to which *Klan* was added; the *Kuklos* being changed into the fantastic *Kuklux*. *Metropolitan Magazine*, September, 1905. See also Lester and Wilson, *Ku Klux Klan*, p. 55. Brown, *The Lower South* (1902), p. 200, gives the same derivation.

reverently acknowledges the majesty and supremacy of the Divine Being as well as the relation of the people to the United States government, the supremacy of the Constitution, the constitutional laws, and the union of the States. The "Empire" of the order was declared to include all the States of the ex-Confederacy as well as Kentucky and Missouri. The officers were to be known as the grand wizard of the empire and his ten genii; a grand dragon of the realm and his eight hydras; a grand titan of the dominion and his six furies; a grand giant of the province and his four goblins; a grand cyclops of the den and his two night hawks; a grand magi (sic), a grand monk, and others. The body politic was designated as "the Ghouls." The candidate for membership was put through a catechism resembling in many respects the ritual of the Knights of the White Camelia. He must swear that he was not a member of the radical Republican party, of the Loyal League, or of the Grand Army of the Republic; that he was opposed to the principles of the radical party and to negro equality; and that he favored the reenfranchisement of white men and a white man's government in the South.

The order, which was now highly centralized, was presided over by the grand wizard, General N. B. Forest, the brilliant Confederate leader. Its "invisible empire" was to prove more than a match for the visible Union League. It was found very difficult, however, to control the lawless elements which began to insinuate themselves into the order. From the extermination of the so-called "Tories" of the mountain districts, who committed outrages on the Confederate sympathizers, the more reckless dens of the association passed to the commission of outrages on their own account. Even private quarrels were settled through the instrumentality of the K. K. K., and persons having no connection with the order used its name and disguise to cover their crimes. As a result, in March, 1869, a decree of the grand wizard disbanded the order, and declared that all papers and property of the dens should be destroyed. This

decree never reached some of the dens, and the operations of the scattered clans, relieved from central control, became more violent than before. Spurious dens were established, and the better class of whites repudiated the lawless conduct of the midnight bands who, disguised as ghosts, whipped and even killed those who had aroused their enmity. It was maintained that these lawless bands, bent on plunder and outrage, were often radicals.¹

In 1871 two drastic laws or force bills against the order were passed by Congress. It was only natural that the later discreditable history of the order should lead to the general belief in the North that from the beginning the society had warred against law and order. Its original aims and objects, which were justified by the disorganization of the South in politics and the social unheaval accomplished by the reconstruction acts and the supremacy of negro rule, were obscured by the lawless acts of its more reckless elements. Such secret organizations, whatever good they may accomplish, bear within themselves the seeds of their own destruction. They become a cloak for the deeds of desperate men; and the better elements of society, in self-protection, find it necessary to disown or destroy what they have founded.

The organization has been compared by one writer² to the famous Carbonari, who worked for the liberation of Italy in the early nineteenth century; by another to "that secret movement by which, under the very noses of French garrisons, Stein and Scharnhorst organized the great German struggle for liberty." "It was a magnificent conception," says Thomas Dixon,³ "and in a sense deserved success. It differed from all other attempts at revolution in the caution and skill with which it required to be conducted. It was a movement made in the face of the enemy, and an enemy of overwhelming strength. Should it succeed, it would be the most brilliant revolution ever accomplished. Should

¹ Brown, *The Lower South*, p. 209.

² Garner, *Reconstruction in Mississippi*, p. 353.

³ In *Metropolitan Magazine*, September, 1905.

it fail—well, those who engaged in it, felt that they had nothing more to lose.”¹

The evidence of the existence of Ku Klux methods in Louisiana, though not of any organization connected with the parent association, is found abundantly in the reports of the congressional committee. A merchant of Sabine parish testified that there were some K. K. K. in his parish. They did not attack negroes, but only white hog-stealers. When they became reckless and attacked good citizens in order to steal their horses, the honest folks of the parish rose up against them. “They passed as spirits,” testified an old negro of De Soto parish, “and pretended to raise the dead rebel soldiers. . . . They charged right through the graveyard on horseback. . . . They would come round and tell a man ‘Hold my head till I fix my backbone right’; and the colored people didn’t know whether they were ghosts or not, because one of them went to a man’s house and called for a drink of water. He drew three buckets of water and carried to him, and he drank every drop of it.”² If one of these sheeted visitors was asked why he drank so much, he would answer: “If you were dead and in hell as long as I have been, you would drink a sight of water,” or, “That’s the first drink I have had since I was killed at the battle of Shiloh.” In Franklin, Sabine, Washington, Claiborne, Morehouse, and Tangipahoa parishes the K. K. K. were abroad more than once, and in the latter parish they killed one John Kemp and wounded another man. In Morehouse parish the K. K. K. sent warnings to objectionable radicals in the following form:—

¹ When Congress (in 1870-1871) sent committees to investigate the Ku Klux Klan, “to the majority, ‘Ku Klux’ meant simply out-laws; the minority thought that the first Ku Klux in history were the disguised men who, against the law, threw the tea overboard in Boston Harbor.” Brown, *The Lower South*, p. 222.

² Report on Contested Elections, pt. I, p. 153. They had large leather sacks concealed under their disguises.

"OLD GRAVE YARD,

"The Hour of Midnight.

"W. A. Moulton:

"The time has come. Nine (9) is left you. The time is yours! Improve it! Or suffer the penalty! The pale faces are against you. Depart, ye cursed. We cannot live together Nine days!

K. K. K."

Prominent men in Louisiana, when examined before the congressional committee in 1868, denied that there was any connection between the Ku Klux Klan and the Knights of the White Camelia; they were proud of their membership in the latter, and generally condemned the excesses attributed to the former association. Yet the two orders were so similar in their objects that it was only natural that the knights should be accused of acts of violence and intimidation perpetrated by the K. K. K. Color was lent to this accusation by the fact that some reckless individuals joined the knights to secure the protection of that organization, and then disguised themselves like the Ku Kluxes and committed outrages.¹ The better class of whites deplored these outrages, and this feeling was expressed in the following editorial:—

"STOP THEM!

"We understand that outrages are occasionally perpetrated under the name of Ku Klux Klan. We really believe that the principles of that organization are truly set forth in the article we publish to-day on the first page, and if we are correct in our opinion, the organization is such a one as the times and the circumstances in which the people of the South are placed call for. It is an organization that is intended, in the absence of law and order, to protect ourselves, our families, and our property, and eventually to insure us the possession of our inherent and constitutional rights. We cannot believe that the men who, some nights since, went to Cardell's and abused negroes and robbed them of their watches were the Ku Kluxes. . . . These were a set of violent men that took upon themselves the name of Ku Klux and under that name were doing a great deal of injury to the good citizens who were doing their best to prevent it."²

It was only natural that in the excited state of public sentiment in the North all outrages in the South should be regarded as political and should be exaggerated in number

¹ Testimony of R. P. Webb, Report on Contested Elections, pt. I, pp. 725 ff.

² Franklin Sun, October 3, 1868.

and in degree. Rhodes, in his recent history of this period, recognizes this tendency to exaggeration on the part of the North, and then falls into a similar exaggeration by declaring that the Ku Klux Klan was not responsible for the disorder and lawlessness in the South, and that "Godkin showed a true appreciation of the state of Southern society when he wrote, 'the South before the War was one vast Ku-Klux-Klan.' Gentlemen used the revolver, and the poor whites the bowie knife as the final argument in a controversy."¹ It is certainly true that before the war, as well as at the present time, the Southerners have recourse far less frequently than the Northerners to the courts for redress of grievances, especially where the honor is touched, but it is simply gross exaggeration to assert that the disorder under the Ku Klux régime in 1867-1870 was the normal condition of the South before the Civil War. The candid student of southern life before the great conflict will enter a strong protest against Rhodes's approval of Godkin's judgment on this point.

¹ Rhodes, *History of United States*, VI, 184.

CHAPTER XI.

MASSACRE OF 1868 AND THE PRESIDENTIAL ELECTIONS.

For two months previous to the presidential election of 1868 there was much excitement in Louisiana, and there were constant reports of outrages or "massacres" in the country parishes and even in New Orleans. Although great numbers of the more timid negroes were frightened by bands of disguised whites in some of the parishes into voting the Democratic ticket or into staying away from the polls altogether, while others were intimidated by the processions of the Innocents, the Rangers, and other Democratic clubs, there were great numbers who were aroused by their radical white leaders to assert their legal rights against the whites and even to commit acts of aggression. This was especially the case when the blacks were assembled in large crowds and were excited by reports of attacks on their own race. Many of them who individually would have been fearful of opposing their old masters, to whom they felt they owed a kind of natural obedience, were, when congregated, capable of acts of extreme violence, which in all cases brought down upon them the swift vengeance of the whites. To the carpet-baggers and other white leaders, who had come down from the North and were hopeful of using the negroes for their own ends, it seemed eminently proper that the negroes, if threatened or attacked, should repel violence with violence. To the Southerners the sight of their ex-slaves, excited by strangers to take up arms for any reason against their former owners, seemed nothing less than a servile insurrection, the fear of which had hung over the South like a dark cloud in the days of slavery. When the blacks, therefore, appeared in arms, all thoughts of politics were dropped, and the ensuing conflict, which in the

North was reported as "a political massacre," became in reality a race war. Even southern Republicans, and there were many such, joined the Democrats in stamping out "the negro uprising."

Several of these so-called massacres occurred in Louisiana during the month of October, 1868; and both the northern Republican papers and the speeches of congressmen rang with the oppression of Union men in the South, and with the necessity of military rule to guard the rights of "loyal citizens." The most important of these conflicts between the whites and the blacks took place in the parishes of Bossier, St. Landry, St. Bernard, and Orleans. With the sworn testimony of the participants on both sides before us,¹ it is extremely difficult, if not impossible, to obtain an accurate account of the occasion and the results of these conflicts. The testimony is distorted by the usual passion and exaggeration which characterize such affairs.

There were in Bossier parish two so-called riots. The first was at Bossier Point, where some two hundred negroes armed themselves for the purpose, it was believed, of seizing by violence the lands of the planters. The whites promptly put down the uprising, and eighteen of the negroes, having been tried by juries of whites and blacks, were sent to the penitentiary for exciting a riot. It was believed by the whites that in this affair the blacks had been egged on by the agents of the Freedmen's Bureau at Shreveport, but there was no evidence to corroborate this belief. About the middle of October of the same year there was a much more serious trouble in the same parish. Bossier, being on the border of Arkansas, was the scene of an active trade with that State and with Texas. There were engaged in this trade many reckless characters, who, moving from State to State, could not easily be held responsible for their acts. One of these Arkansas traders, passing by Shady Grove plantation, not far from the border of Caddo parish, asked some negroes whether they were radicals; and when a

¹Report on Contested Elections, *passim*.

radical was pointed out, he fired a pistol at him, but failed to hit him. The white man was immediately seized by the negroes and bound; but when some other whites arrived on the scene, the prisoner was surrendered to them. However, about a hundred men came down from Arkansas to investigate the affair, and in the mêlée which followed several negroes were killed. A little later the negroes arrested two respectable white men on the charge that they had been concerned in the previous shooting of the blacks; and when a rumour spread that these two prisoners were to be rescued by the whites, the negroes killed them both. The news of this action aroused much indignation; the whites began to assemble from all directions, and to shoot down negroes wherever they could be found. Some of the blacks took refuge in the swamps, and did not reappear for a month. How many were killed it is impossible to say; the Democrats said forty at most, the Republicans declared that one hundred and twenty were killed and a large number wounded.

On September 28 of the same year (1868) another serious riot occurred at the town of Opelousas, in St. Landry parish. It continued for nearly two weeks, during which time, according to the testimony of the radicals, two or three hundred negroes were killed, while the Democrats asserted that the number did not exceed twenty-five or thirty. The cause of the trouble seems to have been as follows. Several political meetings of negroes were held at Opelousas, and at these, excited speakers declared that in the neighboring town of Washington many of the negroes had been inveigled into a Democratic club, that efforts must be made to bring them back into the Republican party, and that this must be done at the point of the bayonet or, if necessary, by the burning of the town. These speeches aroused the whites of Opelousas, and a number of Seymour Knights went over to Washington to attend the subsequent meetings of the negroes and to discover if violence were really meditated. These men addressed the negroes, warning them of the

danger of their proposed action. Nearly two thousand negroes are said to have been present. The next event was the appearance of an article in a Republican paper of Opelousas, written by a Republican from Ohio who had settled in Opelousas and was teaching a negro school. The writer gave what was regarded by the Democrats as a distorted account of the action of the Seymour Knights in going to Washington, whereupon the school teacher was visited by a committee of three and given a severe whipping. A report spread that he had been killed, and the negroes, at the suggestion of a free man of color, gathered from the neighboring plantations and marched on Opelousas. The citizens, having armed themselves, went out to meet them. Most of the negroes were turned back without difficulty, but with one squad of twenty-three there was a conflict. The negro leader was armed, and when he was told not to fire, he answered that arms had been brought, and that he intended to use them. Thereupon one of the negroes fired a load of buckshot at the whites, who responded with a fusillade. Three whites were wounded and four negroes were killed. The blacks having finally made submission, some ten or twelve of them were put in the Opelousas jail, only to be taken out that night and shot. Great excitement followed, and other negroes were killed in the surrounding country—the Republicans claimed to the number of two hundred, and the Democrats to the number of thirty.

About a month after the Bossier riots (October 25, 1868) a deplorable trouble broke out in St. Bernard parish, just below New Orleans. In this parish there were three hundred and twenty-five Democrats registered and seven hundred Republicans, mostly negroes. The latter, having the upper hand, were for a time very unmanageable. There was much speaking by P. B. S. Pinchback and other Republican leaders, who, the Democrats asserted, made incendiary speeches to the negroes. On the night of October 25 a large band of negroes surrounded the house of Pablo Filio,

who kept a grocery, and was a well-known Democrat. The house was closed, and when they demanded drink, they were refused. Who fired the first shot is disputed, but the negroes riddled the house with bullets, killed Filio, and fired several shots at his fleeing wife and children. They then pillaged the house and retired. This outrage excited great indignation, and a body of Innocents went down from New Orleans to avenge Filio's death. They seized a quantity of goods found in negro cabins, and killed a number of the blacks. Sixty negroes, charged with complicity in the crime, were arrested and put in jail. Here they remained for nearly two months, when the Freedmen's Bureau, finding that there were no specific charges against them, had them released. Later they were again arrested by order of the judge of the parish and put in jail, but no further record of them is obtainable. The judiciary in times of such confusion appears to have been powerless. On election day the sheriff of the parish, who was a Democrat, took upon himself to open the polls, and as no Republican commissioners appeared, the Democrats carried matters to suit themselves.¹ In New Orleans for several weeks preceding the election there were many acts of violence, chiefly as the result of conflicts between the Democratic and Republican clubs which were constantly parading the streets. One night, in front of Dumonteil's confectionery, a negro procession caused some trouble, and was stampeded by shots fired from the gallery of this shop. Just before election day an appeal was issued by the Republican state campaign committee urging all Republicans to go to the polls and do their duty manfully, though it was admitted that there was danger of outrage and violence. On the other hand, the central committee of the Democratic club issued a notice guaranteeing

¹ The testimony of Oliver Taylor, a Democratic negro, is delightful reading. It shows what preparation the average negro had for the exercise of the suffrage, and also the feelings of many negroes toward their old masters. In his testimony Taylor stated that he had persuaded one hundred negroes in St. Bernard to vote the Democratic ticket. Report on Contested Elections, pt. II, pp. 376-382.

protection to all who wished to vote. However, there appeared in the newspapers a mysterious proclamation, signed by "The Council of Seven," and headed "A White Man's Government or no Government," which declared that none but the blue-blooded should be allowed to vote. The Republicans said that this emanated from the Knights of the White Camelia or the Ku Klux Klan, while the Picayune promptly declared that it was a forgery gotten up by the radicals to invalidate the election. The Democrats, in a quiet election, were sure of a large majority, and did not wish the election put aside on a charge of intimidation. However this may be, the Republicans, asserting that they feared violence, did not turn out in large numbers. Of the forty clerks and commissioners of election appointed by them only three appeared. Warmoth himself admitted that he advised Republicans to stay away from the polls.

The election turned out just as both parties expected. The negroes for the most part stayed away from the polls, or if they voted at all, voted the Democratic ticket. The result was that the Seymour and Blair electors received 80,225 votes and the Grant and Colfax electors only 33,225. The Republicans published the returns showing that in seventeen parishes, where no disturbances had occurred, the Republican votes in 1867 was 28,509 in a total registration of 39,812, and that in 1868 it was 25,088 in a total registration of 43,348. In sixteen other parishes, where disturbances had taken place, there was a tremendous falling off in the Republican vote. The registration increased from 63,441 in 1867 to 73,783 in 1868, but at the same time the Republican vote fell off from 28,737 to 6047. This great diminution was of course attributed to the violence and intimidation by the Democrats, and to these causes much of it was certainly due; but it is also certain that a large number of negroes were persuaded without any threats of violence to cast their fortunes with the rehabilitated Democratic party. Warmoth showed that he had received in the spring of 1868 64,901 votes and Taliaferro 38,046, and the

Republicans spoke as if he had received a Republican majority of 26,000; but it will be remembered that the Democrats had no organization at that time, and that those who voted for Taliaferro, who was a native Republican, regarded him only as "the lesser of two evils." Hence this vote was not a fair test of the Democratic strength in the fall of 1868.

INDEX.

- Abell, Judge Edmond, 73, 78, 80, 163, 164, 187.
- Acts of reconstruction (1866-1867), 180-192.
- Allen, Gov. H. W., 65, 66 (note), 107, 111-112.
- Baird, Gen. Absalom, 164, 165-169.
- Banks, Gen. N. P., 32, 43, 45, 55-63, 64-65, 67-68, 83-85, 125, 131-132.
- Beauregard, Major P. G. T., 24-25, 177, 185.
- Benjamin, Judah P., 23, 26, 27-28.
- Bossier parish, riots in, 226-227.
- Boyce, Henry, 115, 116.
- Buchanan, Gen. R. C., 201.
- Butler, Col. A. J., 35, 119.
- Butler, Gen. B. F., 29, 33-44, 117-122.
- Compensation of slaveholders, 56, 60, 66, 70-71.
- Confederates during reconstruction, 65-66, 89-90, 103-105, 107-108, 122-123, 186-192.
- Confiscation act (1862), 36-40.
- Congressional reconstruction, 81-82, 149-155, 180-192.
- Constitutions of Louisiana (1852-1867), 45-46, 47, 48, 49, 67, 70-76, 79-81, 195-200.
- "Contrabands," 117 (and note).
- Convention of 1864, 67-87; of 1866, 155-175; of 1867, 193-198.
- Conway, J. W., 202.
- Conway, Rev. T. W., 202, 207.
- Cooperationists, 17, 20 (note), 21-22.
- Cottman, Dr. Thomas, 41, 48, 50.
- Crescent, The (New Orleans), 23, 147, 149.
- Cutler, R. King, 78, 90.
- Delta, The (New Orleans), 23, 35, 149.
- Democratic party, 10-11, 13, 109-112, 159-161, 203-204, 209-215, 217.
- Denison, G. S., 36, 42 (note), 43 (notes), 69 (note), 129.
- Dostie, Dr. A. P., 29 (note), 41, 161-162, 168.
- Dunn, Oscar J., 202 (and note), 203.
- Durant, Thomas J., 46, 47, 83 (and note), 85-86, 189, 190.
- Durell, Judge E. H., 69, 73, 77, 157.
- Elections in Louisiana, 16, 21-22, 41-42, 46-50, 51, 55-62, 65, 67-68, 88, 106-114, 147-148, 191, 193, 200-202, 209-215, 225, 230-231.
- Emancipation proclamation, 46, 123-127.
- Executive reconstruction, 45-66, 99-145, 149-155, 175-179.
- Farragut, David G., 31.
- Fellows, J. Q. A., 49, 60.
- Fenner, C. F., 109, 116.
- Field, A. P., 91.
- Flanders, B. F., 41 (note), 42, 57, 190.
- "Forty acres and a mule," 102, 134.
- Fourteenth amendment, 154-155, 184, 204.
- Free State party, 45-47, 50-52, 55, 56-59.
- Freedmen's Bureau, 133-137.
- Gayarré, Charles, 11 (and note), 19, 27 (note), 116.
- Hahn, Michael, 42, 57-64, 90, 162, 168.
- Hancock, Gen. W. S., 191 (and note), 197-198, 200-201.
- Handlin, W. W., 72, 73 (and note).
- Hebert, Gov. P. O., 14-15.
- Home colonies, 135-136.
- Howell, Judge R. K., 41 (note), 73, 93, 96, 157-158, 173, 174.
- Hunt, Randall, 41 (note), 116 (and note).
- Innocents, The, 314.
- Johnson, Andrew, reconstruction

- under, 99-145, 149-155, 175-179.
- Jonas, B. F., 12 (note), 20 (note), 65 (note), 116.
- Judiciary in Louisiana, 92-97.
- Kenner, Duncan F., 19, 65, 185.
- Knights of the White Camelia, 205, 215-218, 223.
- Know-Nothing party, 11-12.
- Ku Klux Klan, 218-224.
- Legislature, Louisiana state (1864), 88-90; (1865), 115-117, 138-145; (1866), 146-149; (1867), 184; (1868), 203-204, 207.
- Lincoln, Abraham, attitude of Louisianians toward, 15, his views on slavery, 25-26, on Louisiana elections (1863-4), 48, 50-52, on reconstruction, 52-54, 82, 98-99, on negro suffrage, 63-64, on Louisiana constitution of 1864, 80 (note), his "Provisional Court," 93-96.
- Longstreet, Gen. James, 185-187.
- Louisiana, ante-bellum history in, 9-28; events of the war, in, 28-32; Butler's administration in New Orleans, 33-44, 117-122; Banks's administration in New Orleans, 45-66; convention of 1864, 67-87; government during the war, 88-97; reconstruction under President Johnson, 98-145; riot of July 30, 1866, 146-179; reconstruction acts (1866-7), 180-192; restoration to the Union, 193-204; party organization, 205-224; massacre of 1868 and the presidential elections, 225-231.
- Massacre of 1868, 225-230.
- May, Thomas P., 77-79, 84 (note).
- Merrick, Mrs. C. E., 29, 126.
- Metropolitan Police Bill, 208-209.
- Monroe, John T., 148, 187.
- Moore, Gov. T. O., 15-16, 17, 24.
- National Conservative Union party, 111, 137.
- Negro in relation to his master, 127-130.
- Negro labor, 117-120, 130-143.
- Negro schools, 74-75, 79, 199, 207-208.
- Negro soldiers, 120-123.
- Negro suffrage, 58-59, 62, 63-65, 67, 71-72, 79, 88-89, 108-111, 112-113, 143-145, 154-155, 159-179, 181-185, 187-189, 192, 193-196, 199-200.
- New Orleans, capture of, 30-31; Butler's administration in, 33-44, 117-122; riots in, 146-179, 229-230.
- Oath of allegiance, 38-39, 203-204.
- Opelousas, riot in, 227-228.
- Ordinance of secession, 18, 19-22.
- Peabody, Judge Chas. A., 93-96.
- Picayune, The (New Orleans), 21, 23, 108, 206, 211.
- Pinchback, P. B. S., 195 (and note), 200, 208 (and note).
- Pitkin, J. R. G., 176 (note), 188.
- Porter, Commander D. D., 32.
- "Provisional Court," 93-96.
- "Radicals," *see* Republican party.
- Reconstruction in Louisiana, *see* Louisiana, Congressional reconstruction, Executive reconstruction.
- Report on New Orleans Riots, 170-175.
- Republican party, 112-115, 155-179, 203, 210, 212, 214-215.
- Republican, The (New Orleans), 194-195.
- Riddell, J. L., 47-48.
- Riot of July 30, 1866, 146-179.
- Roselius, Christian, 18, 41 (note), 60, 69 (and note).
- Rozier, J. A., 17, 18, 41 (note), 68-69.
- St. Bernard parish, riot in, 228-229.
- Secession in Louisiana, 14-28.
- Shepley, Gen. G. F., 33 (note), 41, 96.
- Sheridan, Gen. P. H., 164, 170, 187, 189, 190, 191.
- Slavery, 12, 14, 25, 56-58, 60, 70, 72-74, 79.

- Slidell, John, 10, 12 (and note), 26-27.
- Social equality, question of, 64 (note), 129-130, 162, 178, 187-189, 207-208, 215.
- Southwood, Marion, 34, 39.
- "Squatter sovereignty," 12, 13.
- "Star" cars in New Orleans, 188.
- Steedman, Gen. J. B., 209, 213.
- Stevens, Thaddeus, 152-153, 154, 158 (and note), 180 (and note), 182 (note), 185 (note).
- Sumner, Charles, 91-92, 153, 154, 180-181.
- Taliaferro, J. G., 18, 22, 194, 230.
- Taylor, Gen. Richard, 31-32, 104 (note).
- Thirteenth amendment, 90.
- Times, The (New Orleans), 49-50, 76, 77-79, 95, 115, 176-177, 185, 187, 192, 196.
- Tribune, The (New Orleans), 142-143, 144 (note), 188-189, 195, 196 (and note), 212-213.
- Union party, 40-42, 45-59.
- Union, The (New Orleans), 58.
- Vagrant law (1865), 140-142.
- Voorhies, Albert, 164-166, 189-190, 202 (note), 203.
- Warmoth, H. C., 113-115, 201, 203, 205-206, 230.
- Wells, J. Madison, 57-58, 104-107, 109, 111, 112, 113, 116, 146-149, 159, 166-167, 173, 184, 185, 189, 190.
- Whigs, 9-11.
- White Camelia, *see* Knights of the White Camelia.
- Wickliffe, R. C., 15, 109.

THE TRADE UNION LABEL

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and
Political Science

THE TRADE UNION LABEL

BY

ERNEST R. SPEDDEN, PH.D.

Sometime Instructor in Political Economy in Purdue University

BALTIMORE
THE JOHNS HOPKINS PRESS

1910

COPYRIGHT 1910 BY
THE JOHNS HOPKINS PRESS

PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

TABLE OF CONTENTS.

	PAGE.
CHAPTER I. The History of the Label.....	9
CHAPTER II. The Form of the Label.....	23
CHAPTER III. The Administration of the Label.....	32
CHAPTER IV. The Financing of the Label.....	41
CHAPTER V. The Use of the Label.....	51
CHAPTER VI. The Demand for the Label.....	63
CHAPTER VII. Trade Jurisdiction and the Label.....	79
CHAPTER VIII. The Legal Protection of the Label.....	89

PREFACE.

This monograph is one of a series of investigations into various phases of American trade unionism undertaken by the Economic Seminary of the Johns Hopkins University. In addition to using the large collection of trade-union publications at the Johns Hopkins University, the author has supplemented such documentary information by personal observation and by interviews with the officers of the leading American trade unions in the chief centers of industry in the United States.

The author desires to acknowledge the assistance received in every part of the work from Professor Jacob H. Hollander and Associate Professor George E. Barnett.

CHAPTER I.

THE HISTORY OF THE LABEL.

The union label is in origin distinctively a device of American trade unionism.¹ Attempts have been made to find in the "hall marks" of the mediæval guilds prototypes of the labels of the trade unions of the present day; but the analogy appears to be one of fancy rather than of fact.

The history of the label falls into three periods which may be distinguished as follows: (*a*) the introduction of the label among the cigar makers; (*b*) the adoption of labels by other trade unions, largely through the influence of the Knights of Labor, as a means of combating particular forms of competition to which the members of these unions were subject; (*c*) the widespread use of labels as a matter of general union policy.

(*a*) The introduction of the label in the cigar making industry was the direct result of competition between Chinese workmen and the "white" cigar makers of San Francisco. The Chinese immigrants who came to this country in increasing numbers after the ratification of the Burlingame Treaty in 1868 found employment in laundries, boot and shoe factories, cigar factories, slipper factories, shirt factories, wool and clothing factories, and in domestic service. The cigar industry was, however, particularly open to the influx of such labor on account of the ease with which the trade of the cigar maker may be acquired. In 1876 a San Francisco cigar maker in his testimony before the Joint Special Committee of Congress to investigate Chinese Immigration estimated the number of Chinese cigar makers in San Francisco at over 6000 and the number

¹ For an account of the use of the label in England, Australia, and France, see Choppé, *Le Label* (Paris, 1908), pp. 221-337.

of white cigar makers at 150.¹ The Chinese laborers in the cigar industry earned on the average about six dollars a week, while the whites earned twice as much. The higher wages of the whites was due partly to their greater speed and partly to the fact that they were able to secure a higher piece rate.

The white cigar makers felt keenly the competition of the Chinese, and in 1875 a local union of white cigar makers, not affiliated with the Cigar Makers' International Union and known as the Cigar Makers' Association of the Pacific Coast, was organized. The membership of the association consisted at first of ten cigar makers, one half of whom were out of work. Immediately after its formation the association incorporated under the laws of California, and adopted a stamp² which was registered as the trade mark of the association. The stamp was made of white paper and was pasted on the box containing the cigars. It had on it the following legend: "CIGAR MAKERS' ASSOC'N. The cigars contained in this box are made by WHITE MEN. This label is issued by authority of the Cigar Makers' Association of the Pacific Coast and adopted by law." The stamps were issued only to those manufacturers who employed exclusively white cigar makers. Only one workman, however, in each shop need be a member of the association.

The following extract from the testimony of Frank Muther, an officer of the association, before the Congressional Committee of 1876-1877 outlines the method of administering the stamp:³

"Q. How can you tell what number of cigars men make in a particular shop?—A. I will have to explain our society. I am

¹ S. Misc. Doc. No. 36, 44th Cong., 2d Sess., p. 313. See also Coolidge, *Chinese Immigration*, pp. 365-371.

² The present writer is informed by Miss Lucille Eaves of the University of Nebraska that in 1869 the Carpenters' "Eight Hour League" of San Francisco had adopted a stamp to be used on the products of planing mills which were run for only eight hours. It is possible the cigar makers profited by the example of the carpenters.

³ S. Misc. Doc. No. 36, 44th Cong., 2d Sess., p. 314.

pretty well posted in our constitution. We will suppose that one of these gentlemen keeps a cigar-shop; he has white labor to work. If he wants to obtain this stamp it is necessary for him to have one man belonging to the society in his shop; all the rest may be foreign to us; and then that man will put down every Saturday every cigar each man made, Muther, Harris, Connor, each man so many. This man is bound to report at our headquarters, 107 Geary street, every Saturday night, or between Saturday and Monday, and make regular papers. We have regular headquarters there, regular officers, a safe, and a regular book where everything is entered. If this man should call for stamps, the stamp committee opens the book to find out how many he is entitled to, for they know how many he has manufactured and they cannot fool us on the number of boxes. They cannot put a stamp for one hundred cigars on boxes of twenty-fives, as it reads plainly there are 100 cigars in this box, or 50 or 25 cigars in this box, as the case may be."

The stamp appears to have had for a time considerable influence in diverting trade from the Chinese to the white shops. The anti-Chinese feeling was strong and the association availed itself fully of this aid. By 1878 fifty manufacturers were using the "union label,"¹ though only three or four of these conducted large shops. Under date of March 2, 1878, a committee of the association wrote to the Cigar Makers' Official Journal, the organ of the International Union, that they could find employment for sixty men in San Francisco. They said: "There are now a dozen jobs to be had as against one which was to be had last year. There is an organized movement on foot to drive the Chinese out of the country. They are being replaced by white men as fast as such can be procured." Under date of September 29 of the same year the corresponding secretary of the association wrote: "I only wish

¹ The term "union label" was probably used shortly after the introduction of the stamp, although Mr. Muther in his testimony, quoted, in part, above, always referred to the device as the "stamp." The first use of the term "label" found by the present writer is in the Cigar Makers' Official Journal, October, 1878, p. 1. In a communication to the Journal the corresponding secretary of the Cigar Makers' Association of the Pacific Coast said: "Since about a year ago, or, I might say, since the agitation on the part of the workingmen of California against the curse of Chinese immigration, we have adopted a different course. . . . We appealed to the consumers to buy no cigars that had not the union label on the box, if they wished to place it in the hands of men of our own race, thereby creating a demand for white men's cigars and to a great extent compelling manufacturers to employ white labor only in order to get the union label. . . ."

that some 200 or 300 cigarmakers would come here from the East. We must devise some plan for getting men from the East in order to stop the cry of those manufacturers, who say it is impossible for them to get white men." The campaign of the association was warmly aided by Denis Kearney and the other leaders of the Sand Lot agitation.¹ Great stress was laid on the crowded and unsanitary conditions of the Chinese shops as affecting the desirability of goods made in such shops.

The efforts of the association did not, however, yield permanent results in controlling custom for the white cigar makers of San Francisco. Cigars were imported from the East to supply the demand for cigars made by white labor.² As the outcry against the Chinese lessened, the efficiency of the label in controlling custom decreased. In 1881 the Trades' Assembly of San Francisco estimated the number of white cigar makers in San Francisco at 179 and the number of Chinese workmen at 8500.³ The San Francisco union, however, continued the use of the "white label" until 1884, when it was replaced by the label of the International Union.

In 1879 the St. Louis cigar makers' union adopted a label. Cigar makers' organizations had existed in St. Louis, with intermissions, from 1858; but in 1863 the first organization on strictly trade-union lines was formed. It was affiliated as a local union with the Cigar Makers' International Union of America, and prospered for some time, but owing to internal dissensions and the attacks from opponents of organized labor it was dissolved in the spring of 1877. On December 4, 1877, a few of the former members organized a new local union and received a charter

¹ At a meeting of the association in January, 1879, Kearney made an address, and later accompanied a committee of the association on a round of the Chinese cigar shops. *Cigar Makers' Official Journal*, January and February, 1879.

² *Ibid.*, January, 1879. The *Journal* alleged that the cigars imported from the East were made in tenement-house shops. One enterprising eastern manufacturer, according to the same authority, introduced "cigars with labels of murdered chinamen."

³ *Ibid.*, December, 1881, p. 7.

from the Cigar Makers' International Union of America. After a short period of prosperity it became weak almost to the point of disorganization, and in August, 1879, was re-organized with less than twenty-five members. A rally of the cigar makers of St. Louis was held, a new bill of prices was formulated and presented to every shop. Strikes were declared in those shops which refused to pay the union rates. The manufacturers declared that rather than pay the prices demanded they would buy their cigars from factories in other cities.

In this emergency the president of the union conceived the idea of adopting a label in order to stimulate the demand for cigars made by St. Louis labor. The union approved the suggestion, and a label was designed and registered as a trademark in the name of the president. The description of the label as given in the application for registration was as follows: "44 Union Cigar Makers' Label 44. St. Louis, Mo. F. von der Fehr; in the centre of said label is a ring in which are the words, Cigar Makers' Union, No. 44, St. Louis, Mo. and two leaves representing tobacco, also two hands uniting." The label was red, and was printed on glazed paper as a protection against removal by wetting.¹

The corresponding secretary of the St. Louis union in a communication to the Cigar Makers' Journal under date of September 26, 1879, said: "This union has issued a union label, to be affixed to each box of cigars by those manufacturers only who are paying the prices demanded. We have also issued a printed address to the public requesting them to refrain from buying any cigars other than those which bear the union label, indicating that the man who made those cigars is getting the union price for his labor. Some of the manufacturers are crying for our label, being unable to sell their cigars without the union label. We refuse to issue labels to some of our manufacturers, inas-

¹ The writer is indebted to Mr. F. von der Fehr, who was president of the union at the time, for information concerning the adoption of the label.

much as they fail to comply with our demands." In the address to the public issued by the union, after a narration of the causes of the strike, the following passage occurs: "For the better protection of ourselves and those employers who have acceded to our demands we have, under the cover of law, issued the Union Label and be it further understood that this label is only issued to those who are paying to us our just demands. This label is placed in a conspicuous place on part of the box so that all can see it; and we would further ask that the public would patronize those who use this label, as it is a sure indication that the public is with us. This label is not to be used on either tenement house or penitentiary goods." The introduction of the label enabled the union to win the strike and to unionize the shops. The St. Louis union continued to use the local red label until 1889.

The adoption of local labels by the cigar makers of San Francisco and St. Louis attracted the attention of union cigar makers in other cities, and at the session of the Cigar Makers' International Union of America, held in Chicago September 21-24, 1880, Frederick Blend of Evansville, Indiana, first vice-president of the International union, introduced "some resolutions in regard to issuing trade-marks or union labels suitable to be placed on the box in a conspicuous place."¹ The resolutions were adopted and became a part of the constitution of the national organization. At this time the International union was engaged in a struggle in New York City against the manufacture of cigars in tenement houses. The union was also endeavoring to prevent the manufacture of cigars in prison. It seems clear that the idea animating the convention was that the label which had so recently proved effective in St. Louis might serve as a weapon in this warfare. The resolution for the adoption of a label provided that it should certify on its face that the cigars contained in the box on which it was placed "had been made by a first class work-

¹ Cigar Makers' Journal, October, 1880, p. 7.

man, a member of the Cigar Makers' International Union of America, an organization opposed to inferior rat shop, coolie, prison, or filthy tenement-house workmanship."¹ In a letter published in the *Journal* for October, 1880, Mr. Blend said: "Another important work of the late convention I would especially call your attention to, that is the adopting of the union label for union made cigars. If adopted and carefully managed in accordance with the intent of the law, it will prove a valuable protection and safeguard for honest labor, it will to a large extent prevent impositions upon the public and be a positive Detective to help separate and weed out filthy inferior tenement-house, Prison, Chinese and rat shop workmanship at present imposed upon the public in all sections of the country as being the production of skilled mechanics."²

The first labels appear to have been sent to local unions about January 15, 1881. The financial accounts of the union for December, 1880, contain the following item: "Commissioner of Patents, \$7," a payment made in all probability for the registration of the label. The same accounts in January show expenditures for "photoengraving 36 electrotypes and printing of 103 thousand union labels, \$66.60," "copyrighting of label in Canada, \$4.00," "postage of union labels, \$8.25."

The labels were received by some of the local unions with enthusiasm. The local union at Jacksonville, Illinois, wrote on February 4, 1881, that every cigar manufacturer in that city was using the label. The Terre Haute union found after two weeks' use of the label that its membership had increased, and it was "sanguine in the hope that we shall soon have nearly every cigar maker in the city in our union." On April 3 the Detroit union reported that it had

¹ In the label as originally issued the words "coolie, prison, or filthy tenement house workmanship" were capitalized.

² Under date of February 17, 1881, International President Strasser decided that members who worked at home in the evening were not entitled to use the label "because it is a similar system to the tenement-house cigar factories, against which we are fighting." *Journal*, March, 1881, p. 3.

almost doubled its membership "by means of the union label." In May, Mr. Strasser, International president, issued through the *Journal* an "Appeal to the Trade and Labor Unions of the United States and Canada." The greater part of the appeal consisted of a description of the dangers of tenement-house and coolie labor both to the laboring class and to the consumers of their products. A facsimile of the label was reproduced.¹ At the annual session of the union in September, 1881, President Strasser announced that he had issued one and a half million labels, and believed that "if the trades unions of America were but half as numerous as those of Great Britain, the label could be made a power not to be resisted."²

(b) The second period in the history of the union label movement in the United States was characterized by the adoption of labels by certain trade unions, notably the Hatters and Can Makers, as means of combating specific forms of competition, threatened or actual, to which the particular organization was exposed. Roughly speaking,

¹ The International label was light blue in color, and with a change in the wording of the legend (see p. 25) was essentially the same then as now. In practically all the accounts of the introduction of the label it is related that at the convention of the Cigar Makers which adopted the label "a dispute arose between delegates from the Pacific Slope and those from St. Louis as to the color of the label. 'Let us,' said an Eastern delegate 'take the other color of the flag,' upon which the present blue label was adopted." This anecdote in slightly variant forms is found in J. G. Brooks's "The Trade-Union Label," *Bulletin of Department of Labor*, Vol. 3, p. 198; in Choppé's "Le Label;" in Vigouroux's "La Concentration des Forces Ouvrières dans L'Amerique du Nord," and in the Eleventh Special Report of the Commissioner of Labor on "Regulation and Restriction of Output." In none of these works is any authority for the story cited, and in the three latter cases it was probably drawn from Mr. Brooks's article. There is no evidence in the official publications of the Cigar Makers supporting the anecdote. In the minutes of the convention of 1880 nothing is reported concerning any such dispute; in fact, the rules adopted did not prescribe any color for the label. The present writer inquired of Mr. Strasser concerning the incident and received the following reply: "The convention delegated the matter to me. After due consideration I reached the conclusion that the blue color would be most attractive, especially in the evening. All other stories are based upon imagination."

² *Journal*, October, 1881, p. 4.

we may say that from 1880 to 1890 the trade-union label was regarded primarily, not as a means of appeal to unionists to support other unions, but as a means of appeal to the public against conditions which were generally discounted—tenement-house, sweat-shop, and prison labor.

The Hatters had been facing the problem of immigrant competition since 1880. Slavs and Poles were being introduced into the New England hat factories to work in teams at wages below what the American hat makers were receiving. In 1885 the Hat Finishers' Association and the Hat Makers' Association, after a strike at Norwalk, Connecticut, adopted a joint label called "The Label of the United Hatters of North America." From 1885 to 1898 the two organizations remained distinct, and during this period of eleven years "The Label of The United Hatters of North America" was a prime weapon of defense against the encroachment of immigrant labor.

The wider use of the label was much promoted during this period by the solidarity given to the labor movement by the Knights of Labor. A prime doctrine of that organization was that the power exercised by the laborers as consumers, if they could be united, was far greater than as employees. The Knights had from the outset exalted the boycott above the strike as a weapon. They were therefore quick to see the possibilities which lay in the label. In February, 1884, the general executive board adopted an "official label of the Order for use upon goods manufactured or sold by members." The legend on the label declared that the goods upon which it was placed had not been manufactured by "convict, contract or other slave labor."¹ The administration of this label was extremely loose, and it is impossible to determine what assemblies used it. It is certain that almost immediately certain assemblies of cigar makers, profiting by the publicity which the Cigar Makers' International Union had given their blue label, began to use the white label of the Knights.²

¹ Record of Proceedings of the Seventh Regular Session of the General Assembly, 1883, p. 625.

² Proceedings, Knights of Labor, 1885, p. 109.

In 1885 Can Makers Assembly, 1384, of Baltimore, Maryland, identical with Can Makers' Mutual Protective Association, probably because the "white label" of the Knights was not a suitable form of label for marking cans, adopted the following mark—"C.M.M.P.A., hand-made—" to be stamped on the bottom of each can. Machinery was being introduced at that time in the can-making trade, and the can makers conceived the idea of appealing to consumers to purchase hand-made cans.¹ It was maintained that the use of machine-made cans caused injury to the health of the consumers of canned goods, displaced skilled can makers, and was responsible for the employment of women and children under unsanitary conditions.² This label was endorsed by the general executive board of the Knights of Labor, and circulars were issued to the assemblies in its behalf.

From time to time the general executive board granted permission to various other local assemblies to use distinctive labels, although ordinarily it insisted on the use of the "white label." The cigar makers, the boot and shoe workers, the knit goods workers, the file makers, the pearl button makers, the pearl workers, cigar box makers, bakers, trunk makers, glove workers, umbrella workers, and leather workers were allowed to have special devices.³

The only national trade unions besides the Hatters and Cigar Makers to adopt a label before 1890 were the Germania Typographia (1885), Typographical Union (1886), Garment Workers (1886), Coopers (1886), Boot and Shoe Workers (1887), Bakers (1886), Molders (1887), Tailors (1886). In none of these unions, however, was the label important until after 1890. In several cases labels were adopted but so little employed as to be later replaced by entirely new ones.

The final breach between the national unions and the Knights of Labor was largely due to a controversy between

¹ Proceedings, 1885, pp. 156, 163.

² Proceedings, Knights of Labor, 1886, p. 176.

³ Ibid., p. 136.

the Cigar Makers and the Knights of Labor with regard to the use of the label. The assemblies of cigar makers, as has been noted, were the first of the Knights actively to use the "white label." Early in 1886 the Cigar Makers International Union protested to the officers of the Knights of Labor that assemblies of cigar makers had given "white labels" to manufacturers in whose shops union cigar makers were on strike. The relations between the two organizations became so strained that the general assembly of the Knights in 1886 required all cigar makers who were members of the Knights of Labor to withdraw from the Cigar Makers' Union. The issue of this edict by the executive board marked the beginning of the downfall of the Knights.¹

(c) The third period in the history of the label began about 1890, and is characterized by the use of the label as a general device of trade unionism. Hitherto the use of the label had been confined to a small number of unions, practically all of whom had some appeal to popular sympathy. The wide use of the label after 1890 was due to a change in view with regard to the possibility of rousing a popular demand for the label. As has been noted above the unions which first adopted labels hoped to secure the custom of the public at large. But they soon found that the only effective appeal was to fellow unionists. Mr. J. G. Brooks, writing in 1898 of the union label, lays much stress on the possibility of the unions' winning public sympathy. He says, for example, "In trades like that of the garment workers, a label that should be confidently known to stand for definite improvement in the life of the worker would attract a powerful public sympathy," and he complains that the rules under which the union labels were issued gave ordinarily no guarantee of good quality of work or of sanitary conditions.² By the time of Mr. Brooks's article, however, the unions had almost entirely aban-

¹ Kirk, "National Labor Federations in the United States," in Johns Hopkins University Studies in Historical and Political Science, Series XXIV, pp. 626, 657.

² Bul. Dept. of Labor, Vol. 3, p. 215.

done the plan of cultivating a general demand for label goods. With the abandonment of the idea of the general appeal the way was opened for the wider use of the label. It was not necessary for a union to make out a case to attract custom. It could count as confidently on union support if its members were well paid as if they were poorly paid. In one form or another the use of the label spread from union to union almost without regard to whether it might be effectively used. The label has come to be considered almost as necessary a piece of equipment for a national union as an official seal. In each five-year period from 1890 to 1905 some fifteen national unions adopted labels.

The following list shows the date at which the label was introduced by the different unions:¹

1890 to 1895.

Retail Clerks 1891, Brewery Workmen 1892, 1895, Broom and Whisk Makers 1893, Barbers 1891, 1896, Carriage and Wagon Workers 1895, Horseshoers 1895, 1898, Sheet Metal Workers, 1895, Shirt, Waist and Laundry Workers 1895, 1901, Teamsters 1895, 1903, Tobacco Workers 1895, Travellers Goods and Leather Novelty Workers 1895, Flour and Cereal Mill Employees 1895, 1902.

1896 to 1900.

Brick, Tile and Terra Cotta Workers 1896, Hotel and Restaurant Employees 1896, 1899, Wood Workers 1896, Leather Workers on Horse Goods 1898, Musicians 1897, Machinists 1897, 1905, Metal Polishers and Buffers 1897, Brush Makers 1897, Elastic Goring Weavers 1897, Boiler-makers 1898, 1901, Meat Cutters and Butcher Workmen 1898, Piano and Organ Workers 1898, Stove Mounters 1898 Upholsterers 1898, Blacksmiths 1900, Watch Case Engrav-

¹Where two dates are given, the first is the date when a label is first noted as being in use by organized workmen in the trade, the second is the date of the adoption of the present label.

ers 1900, Wood, Wire and Metal Lathers 1900, Ladies Garment Workers 1900.

1901 to 1905.

Wire Weavers 1901, Actors 1901, Jewelry Workers 1901, Wood Carvers 1901, Steam Engineers 1902, Painters 1902, Pressmen 1902, Cloth Hat and Cap Makers 1902, Steel and Copper Plate Printers 1902, Paper Makers 1902, Glass Workers 1902, Gold Beaters 1902, Theatrical Stage Employees 1902, Glove Workers 1902, Leather Workers 1902, Machine Printers 1902, Powder and High Explosive Workers 1902, Rubber Workers 1902, Textile Workers 1903, Stationary Firemen 1903, Print Cutters 1903, Saw Smiths 1903, Tip Printers 1903, Glass Bottle Blowers 1904, Fur Workers 1905, Paper Box Makers 1905.

1906 to 1908.

Marble Workers 1906, Shingle Weavers 1906, Pocket Knife Blade Grinders and Finishers 1907, Woodsmen and Sawmill Workers 1907, Photo-Engravers 1908, Slate Workers 1908.

The use of the union label is not confined to national trade unions. In 1890 the American Federation of Labor adopted a label for the use of those local trade unions not organized into national unions but directly affiliated with the Federation. In 1908 such organizations were the Badge and Lodge Paraphernalia Workers, the Soda and Mineral Water Bottlers, the Coffee, Spice and Baking Powder Workers, the Horseshoe Nail Makers, the Neckwear Cutters and Makers, the Button Workers, the Paper Box Makers, and the Suspender Makers.

Labels have been adopted also by several alliances of trades which combine to produce a single product. The Allied Printing Trades Council label was first issued by the Typographical Union in November, 1893. In 1897 the form of the label was changed to meet the objections of the Pressmen to the monogram of the Typographical Union

which appeared upon this label. In 1905 at a meeting of the joint conference board the representatives of the "Allied Printing Trades" drafted the rules which now control the use of the label of the "Allied Printing Trades' Council." The National Building Trades' Council in 1903 issued two forms of union labels for buildings.¹ The extent to which these labels have been used has been very limited. From 1897 to 1905 the Metal Mechanics, the Machinists, and the Metal Polishers used a joint label.

In 1908 there were affiliated with the American Federation of Labor 117 national trade unions. Of this number 68 unions were using the label in some one of its forms. The total membership of the label-using unions was 724,200, or approximately 47 per cent. of the aggregate membership of the American Federation of Labor, which was 1,586,885.

¹ Bronze labels of large size for public buildings; aluminum of small size for private residences. Labor Compendium, December 27, 1903, p. 1, and February 7, 1904, p. 7.

CHAPTER II.

THE FORM OF THE LABEL.

The trade-union label, using the term in its widest sense, is used in three forms: (*a*) a label to mark a product, (*b*) a shop card for display in a place of business, and (*c*) a button for personal use.

Label on Product.—The trade unions which in 1908 used a label on the product were the Bakery and Confectionery Workers, Blacksmiths, Boot and Shoe Workers, Boiler Makers and Iron Shipbuilders, Brewery Workmen, Brick, Tile and Terra Cotta Workers, Broom and Whisk Makers, Brush Makers, Carriage and Wagon Workers, Cigar Makers, Cloth Hat and Cap Makers, Coopers, Flour and Cereal Mill Employes, Fur Workers, Garment Workers, Glass Workers, Glove Workers, Gold Beaters, Grinders and Finishers, Hatters, Horseshoers, Jewelry Workers, Ladies' Garment Workers, Leather Workers, Leather Workers on Horse Goods, Lithographers, Machine Printers and Color Mixers, Machinists, Marble Workers, Meat Cutters and Butcher Workmen, Metal Polishers and Buffers, Molders, Painters, Decorators and Paperhangers, Paper Makers, Photo-Engravers, Piano and Organ Workers, Plate Printers, Powder Workers, Printing Pressmen, Print Cutters, Saw Smiths, Sheet Metal Workers, Shingle Weavers, Shirt Waist and Laundry Workers, Stove Mounters, Slate Workers, Tailors, Textile Workers, Tip Printers, Tobacco Workers, Travellers' Goods and Leather Novelty Workers, Typographical Union, Upholsterers, Watch Case Engravers, Wire Weavers, Wood Carvers, Wood, Wire and Metal Lathers, Wood Workers, Woodsmen and Sawmill Workers.

Some trade unions are estopped from the adoption of a label because of the character of the demand for the

product. The Granite Cutters and Stone Masons are in favor of the label movement and have considered the adoption of a label, but a label pasted upon the stone would not remain, and the employers refuse to allow any design to be cut in the stone. The Glass Bottle Blowers are in much the same position as the Granite Cutters and Stone Masons. The only satisfactory way in which a label could be put upon a bottle would be to have it blown in the bottle. The employers cannot permit this because the bottles are made, not for sale in the market, but on contract. No practicable method has been found by the Glass Bottle Blowers to meet this difficulty.¹

The legends on the union labels are not ordinarily significant, and in many cases consist simply of a symbol and the name of the organization. The label of the Boiler Makers and Iron Shipbuilders, for example, simply states: "When upon work guarantees that it is the product of union labor." In a few cases the labels do, however, make in their legends either a claim to excellence in the product or that the work was not done under bad sanitary or labor conditions. The label of the Bakery and Confectionery Workers declares itself to be a "guarantee of living wages, reasonable hours of labor, humane treatment, wholesome and clean bakeries and factories and good workmanship." The Cigar Makers' label signifies in its wording "that the cigars contained in this box have been made by a first class workman, a member of the Cigar Makers' International Union of America, an organization devoted to the advancement of the moral, material and intellectual welfare of the craft." The Iron Molders' label sets forth: "This certifies that these castings have been made by competent, first class workmen who

¹A very ingenious adaptation of the label in a case where the product is of such a character as seemingly to preclude the use of any form of label has been worked out by the United Mine Workers since 1899 through coöperation with the Teamsters. The label of the Miners is upon the receipt which the driver carries when he delivers a load of coal, and in this way the purchaser may secure union-mined coal. The use of this label is confined to the State of Illinois.

are members of the Iron Molders' Union of North America, an organization opposed to inferior and prison made goods." The Paper Makers' label indicates the purpose of their organization, "which demands a living wage, reasonable and fair conditions for its members." The Upholsterers' label purports to guarantee that "the Upholstering upon which this label appears was done by a competent workman, a member of the Upholsterers' International Union of North America." In the earlier period of the history of the label the legend was ordinarily a claim for patronage on specific grounds, but since the label has become primarily an appeal to unionists it has been regarded as sufficient to set forth that the product is union made.¹

Three factors have entered into the determination of the method and place of attachment of any particular union label: (1) the nature of the product, (2) the desire to have the label as prominently displayed as possible without offending purchasers, (3) the desire to prevent the reusing of labels.

It may be said in general that labels are attached in four ways. They are pasted or sewed upon the article, or printed upon it, or stamped into it, or riveted to it. The cheapest form of label is the printed strip of paper pasted on

¹ The Cigar Makers' label originally set forth that the union was "opposed to inferior rat shop, coolie, prison or filthy tenement house workmanship." In 1893 these words were replaced by the following, "devoted to the advancement of the moral, material, and intellectual welfare of the craft." In this particular instance the change was probably due to attempts made to have the courts deny legal protection to the cigar makers' label on the ground that the wording transgressed the rules of morality and public policy in that it implied that cigars not bearing the label were not made under good conditions. The only case in which this view prevailed was *McVey v. Brendel*, 144 Pa. St. 235, in which the court said, "When the Cigar Makers' International Union of America stigmatizes those who do not belong to it, and seeks to induce the public to discriminate against them and their work by covering them with opprobrious epithets, it is not engaged in promoting the mental, moral, and physical welfare of its members, but is trying to hurt and destroy those who do not choose to become members." In all the other cases the courts took the view that the legend was not an attack on the cigars made by other than unionists. See *Cohn v. People*, 149 Ill. 486.

the product. The Cigar Makers' label glued on the box is of this kind, as are those of some fifteen other unions. Where the article does not permit the pasting on of paper labels, the next choice is the paper, linen, or cloth label sewed to the article. A large class of commodities do not permit, however, of either method of attachment, as, for example, metal wares.¹ Here resort has been had to stamping on the article with a metal die the union label or to riveting upon it a piece of metal bearing the label. Some unions use more than one method of attachment. Thus, the Meat Cutters and Butcher Workmen use two forms of label: a paper label on the carcass in the slaughter houses, and a stamp burned into the boxes containing products packed by union workmen. The Rubber Workers during their existence permitted the greatest latitude in the method of attaching their label. A local union which wished to use the label on rubber goods was allowed to "arrange the label in any position

¹ The Iron Molders have experienced much difficulty in the use of a paper label. The president of that union in his address to the session of 1899 said: "There is another difficulty, and one which is of a practical character, that inclines me to the belief that so long as we continue to use a paper label we can never expect much success, and that is that manufacturers who have essayed its use have found it well nigh impossible to get a paste that will hold it to the casting. It requires a very strong gum, which, if not used with the utmost care, will deface the labels, and if the label does come off it leaves a defacement on the casting that can scarcely be removed. Some of the foundries that are using the label don't put them on their wares except as ordered, and I have come across dealers who have received the labels in bulk from the foundry, and when the label was called for by a prospective buyer he would go to the desk, and, securing a label, lay it on the stove. The reason given for this is that if the label be placed on the stove before it goes to the warehouse, it would be so soiled and defaced as to be unrecognizable. The label handled in this way could be placed on any stove, whether made by Union or non-union molders. In the face of these objections, then, it must be apparent that it is necessary to adopt a different device than the one now in use if it is to be of any advantage to us. The idea that suggests itself to me is to secure a new design in the form of a stamp, an impression of which could be placed on the mold of such part of the stove or casting as would be most conspicuous and the least objectionable to the foundry proprietor; these stamps to be placed in the hands of one of our members in the different foundries who would be held responsible for its proper use;" see President's Report, twenty-first session, 1899, in *Iron Molders' Journal*, vol. XXV, no. 9, pp. 15-16.

which will be best suited to attach to the machinery.”¹ In practice the label was affixed by impressing the rubber with a steel stamp, by pasting paper labels on the products, or by engraving the label upon the “collender rolls” and thus securing an impression of the label on the rubber.

The label must be sufficiently prominent to be readily found, but its display must not be so conspicuous as to drive away consumers. The Hatters’ label illustrates these conditions very well. It is attached to the inside of the hat under the bow ribbon on the outside band, and is stitched in such a way that the thread of the label must pass through the bow. It is concealed, and at the same time it may be readily found by any one who is desirous of having the label on the product. The United Garment Workers use a linen label sewed in the hip pocket of overalls, in the inside pocket of coats, in the inside pocket of vests, and in the hip pocket of pants. The Tailors’ label is placed similarly “on coats in the inside of the breast-pocket. On vests in the middle of the back-strap, on the inside of the waist-band or on the inside of the watch-pocket.”² The Fur Workers’ label is “sewed in the inside pockets of all coats and garments where it is possible to do so. If there is no pocket in the garment, the label shall be put on in any other suitable place.”³ The Boot and Shoe Workers imprint their label upon the sole, the insole, or, since 1902, the lining of boots and shoes.⁴

The Printers have frequently had objections raised to the use of their label on the ground that it was unsightly, and they have endeavored to meet this difficulty by issuing very small electrotypes for printing the label. A customer may thus have the typographical label reduced to tiny dimensions. But even at the present time ardent unionists admit that the use of the label on small jobs, such as visiting cards, is inartistic. The Carriage and Wagon Workers

¹ Constitution, 1903, p. 39.

² Constitution, 1906, p. 30.

³ Constitution, 1904, p. 8.

⁴ Constitution, 1902, p. 12.

in 1903 decided to issue their label in three different sizes to meet the demands of the manufacturers for a small and less conspicuous label, and in 1904¹ the same union adopted a distinct label for the "lamp-makers, axle makers and allied branches of the trade." The Bakery and Confectionery Workers find a great deal of objection to the label on bread.

Some unions have been led to change the form or method of attachment of their labels in order effectively to prevent the reusing of labels. The General Council of the Amalgamated Wood Workers, for example, in 1900 changed from a metal label to the present decalcomania stamp in order to prevent the removal of the label and its attachment to non-union work. The label of the Cigar Makers is pasted across the top and the front of the box in such a manner that the label must be broken when the box is opened. Until 1903 the label was pasted on the inside of the box.

A few unions use different labels for different products. The Boot and Shoe Workers are not confined to the use of that form which is seen on new work. At the sixth convention, held in Cincinnati in 1904, the "Repairers' Stamp" was adopted for those union repair shops employing one or more journeymen "who have been members for six months."² The Upholsterers have two forms of label, one for the Upholsterers and one for the Mattress Makers. The Coopers use three forms of label, one for "tight work," one for "slack work," and an ink stamp for the "bottom and at least one stave for tanks and vats made in parts; and if set up by members of the Coopers International Union, the regular 'tight' or 'slack' label is impressed upon the product in addition to the ink stamp previously imprinted upon the sections."³ The Print Cutters have two forms of label to distinguish the two distinct branches of the trade. "The Cutters' Label" is made

¹ Proceedings of the Carriage and Wagon Workers, 1904, p. 62.

² Proceedings of the Boot and Shoe Workers, 1904, p. 36.

³ Constitution, 1906, p. 14.

of steel and is impressed upon all print blocks or rollers cut by members of the association. "The Putters On" have a label in the form of a disc, which contains the words, "National Print Cutters' Association of America." The label of the cutters has only the letters " N. P. C. A. of A." The label of the "Putters On" is used on all print blocks, rollers, and sketches made by members of the association.

There are two forms of the label in use among the Horseshoers. The journeymen have a separate form of the label and the masters have another form. Within this trade there are two distinct organizations, one composed of the masters, i. e., those workmen who run shops of their own and employ one or more journeymen or do the work themselves; the other is made up entirely of journeymen. In the masters' shops the label of the masters is used. The label of the journeymen is used exclusively in what are known as "Corporation Shops," such as are run by the large express and transfer companies to do their own work. The journeymen's label is allowed only on the work done in such shops for the companies which own and operate such establishments. This form of label is not to be found on any work done on any horses not belonging to the corporations which run the shops. The conditions for the issue of these forms of label are fixed by agreements between the two organizations of masters and journeymen.

The Shirt, Waist and Laundry Workers frequently considered changes in the three forms of label which they used, viz., (*a*) the label attached to shirts at the lower part of the bosom, (*b*) the stamp on collars and cuffs, (*c*) the imprint upon laundry lists of union laundries. In 1904 the secretary-treasurer reported that the manufacturers desired to dispense with the cloth labels attached to shirts, and preferred to use the stamp on all products. The union objected to this change because of the financial loss resulting therefrom, but favored a change in the form of the label used in those factories which make only collars and

cuffs on the ground that the wording of the label signified that the firm was engaged in the manufacture of collars and cuffs exclusively. In 1903 the union adopted the "Union Shop Card" for all union laundries and those agencies which give their work only to union drivers.

Shop card.—Certain unions, chiefly those of personal service, use a shop card to indicate that the establishment is conducted according to union rules. These unions are the Barbers, Meat Cutters and Butcher Workmen, Hotel and Restaurant Employes, and Retail Clerks. The Barbers appear to have used such a device since about 1891. These cards are intended to be displayed prominently, and are usually placed in the windows of the establishments.

Buttons.—A considerable number of such unions use a button to indicate that the workman performing the service is a member of the union of his trade. The Retail Clerks, the Barbers, and the Hotel and Restaurant Employes thus use the button in connection with the shop card. The Retail Clerks' International Protective Association was the first of these to adopt a button. From 1891 to 1898 the button was used alone, but since 1898 the button has become less important than the shop card. The Actors, Horseshoers, Steam Engineers, Stationary Firemen, Musicians, Theatrical Stage Employes, and Teamsters use a button. In 1898 it was proposed that the same style of uniform should be worn by all members of the Musicians' Union. It was planned to have this uniform copyrighted, and thus to obtain proprietary use of it. The proposal was rejected, because of difficulties anticipated in obtaining such a copyright, and because it was impracticable to require all bands to wear the same style of uniform. A button was adopted as the emblem of the Union, and remains in use at the present time.¹

In recent years it has frequently been proposed that the national unions affiliated with the American Federation

¹ Proceedings of the Musicians, 1898, and Constitution, 1898, pp. 61, 33.

of Labor should abandon the use of their individual labels and use a single label. In 1908 the executive council of the American Federation was authorized to investigate the matter. A considerable correspondence was carried on with the national unions concerned, but it was found that they were with very few exceptions opposed to any plan which involved the abandonment of their labels. The executive committee then inquired whether the unions were willing to consent to "some universal design upon the labels of all." By the latter plan the labels might differ in many particulars, but all would have in their labels at least one point of resemblance. Eleven national unions favored such a plan, eleven were opposed, and eleven were undecided. The remainder did not reply to the question. The plan for a uniform design has been for the time, at any rate, abandoned.

The main point urged in favor of adopting such a "universal design" has always been that consumers could better identify union goods. It is said that the large number of labels makes it difficult for consumers to remember them, and non-union employers are thus enabled by subterfuges of one kind or another to palm off non-union for union goods.¹ In opposition it has been urged that in the case of certain unions, e. g., the Printers, the label would have to be increased in size, and this, as has been noted above, is objectionable. It has also been urged that the different unions take a keener interest in the propaganda for their individual labels than they would in that for a "universal design."

¹ The Tobacco Workers complained, for example, in 1904 that a firm of tobacco manufacturers were placing on the market a brand of tobacco under the name of "Union Leader" and with a label on it similar to the label of the Tobacco Workers. A. F. of L. Proceedings, 1904, p. 156.

CHAPTER III.

THE ADMINISTRATION OF THE LABEL.

The administration of the label in practically all the unions in which it plays an important rôle has been transferred more and more from the local to the national union. This development has two aspects. In the first place, the national union has determined more and more fully the conditions under which the label shall be granted. This phase of the subject will be treated in the following chapter. In the second place, the methods of issuing the label have been explicitly defined by national rules; and certain officers, local and national, have been assigned duties with reference to the label.

This centralization of administration has been due to two causes. The enforcement of national regulations concerning the conditions under which the label may be issued could hardly be accomplished except by the building up of such a national administrative system. But more than this, from the very beginning it has been found difficult to prevent the unauthorized use of labels. The main object, then, which the administrative provisions seek to accomplish is to impose upon certain officials a definite responsibility for the issue of the label, and thus to prevent its illicit use.

Among the American trade unions, however, the administration of the label varies widely in the degree of centralization attained. In general it may be said that in those unions in which the article produced is one for which there is a wide market the degree of administrative centralization is greater. A cigar maker in one city is keenly interested in the methods by which a sister union in another city provides against the illicit use of the label, since the cigars from that city come into competition with his own product. Other unions, as for example the Bakers, whose

product is sold only locally, are less concerned with the loose issue of labels by local unions in other cities. In such cases each local union has only to concern itself with providing against any irregularities in the issue of its own labels.

In practically all of the American trade unions which use the label the printing of the labels or the making of the dies with which they are stamped or the electrotypes from which they are imprinted is a duty imposed upon some official of the national union. Originally in many unions this was not the case. The executive council of the Knights of Labor, for example, merely authorized a local assembly to use a particular form of label. Among the Bakers and the Brewery Workers local unions printed labels for their own use at first. Even at present the Horseshoers and a few other unions permit the local unions to furnish their own labels.

The Cigar Makers, Shirt, Waist and Laundry Workers, the Hatters, and the Piano and Organ Workers empower the president of the International union to have "prepared, printed and registered a trade-mark or label." The Wood Workers, Garment Workers, Glove Workers, Fur Workers, Travellers' Goods and Leather Novelty Workers, Bakery and Confectionery Workers, Barbers, Carriage and Wagon Workers, Painters, Decorators and Paperhangers, Horseshoers, Hotel and Restaurant Employes, Retail Clerks, Broom and Whisk Makers, Sheet Metal Workers, Typographical Union, Ladies' Garment Workers, Tobacco Workers, and Coopers empower either the secretary or the secretary-treasurer of the national union to perform the same duties. The Cloth Hat and Cap Makers have an officer known as the "label holder" who keeps the labels under lock and key and gives them as needed to the national secretary, who in turn distributes them to the local unions.¹ The "label holder" through the national secre-

¹ Constitution, Art. VII, Sec. 10 (New York City, n. d.).

tary sends a full report of his work to the union assembled in national convention.

The general executive board is associated in a supervisory capacity with the president or secretary in the administration of the label. This body is usually composed of the president, vice-presidents, and the secretary and treasurer of the international union. It constitutes a "court of final appeal" in all cases of dispute arising from the use of the label. Appeal from its decision may be taken to the annual convention or in some unions to the popular vote.

It is the duty of the national officials indicated above to see that the local officials through whom the labels are distributed perform their duties properly. Ordinarily the local union passes upon applications for the use of the label, but in the cases of the Boot and Shoe Workers' Union and the Glove Workers the national officials make a contract directly with the manufacturer. All the conditions under which the label is to be used are set forth therein. The local unions have, however, the right to refuse their assent to such contracts, and in that case they are not made.

Not only do the national unions supervise the granting of the right to use the label, but they also, in one way or another, attempt to see that the local union does not deprive a manufacturer entitled to the label of its use. Not many of the national unions specifically provide to this effect, but in all the chief label-using unions an appeal by a manufacturer that he was being discriminated against would be investigated, and if found true the local union would be forced to grant the use of the label. The Hatters provide explicitly that "the label shall not be removed from any factory under the jurisdiction of the United Hatters of North America without the consent of the General Executive Board."¹ The Cigar Makers provide that "no employer or member of the union, who is a manufacturer, shall be deprived of the use of the label prior to a regular

¹ Constitution, 1906, p. 17.

trial with an opportunity to present his case personally, by attorney or in writing. The trial board shall be composed of seven members or officers, and shall be elected annually in the month of January for the period of one year. All charges must be submitted in writing and it shall require five votes to convict. In places where more than one charter is in force, the joint label committee shall be the trial board, each union to have at least one representative on the same."¹

The local administration of the label is vested in the officers either of the "district council" or of the local union. Where, as is the policy of some unions, particularly those of the "industrial" type, more than one local union is chartered in any locality, the "joint councils," composed of representatives from the local unions, administer the label for that locality. The Shirt, Waist and Laundry Workers, the Painters, Decorators and Paperhangers, the Garment Workers, the Boot and Shoe Workers, and the Brewery Workers employ this method. The Typographical Union in those "cities or towns where more than one branch of the craft is organized" empower the Allied Printing Trades Council to act as agent of the International union in the issuance of the labels. Where, as is the more usual practice, it is the policy of the national union to charter only one union in a locality, the local unions and their officers administer the label.

In the great majority of label-using unions the labels are sent to the secretary of the "joint council" or local union, and he distributes them to the factories or shops under the general superintendence of the "joint council," of the executive council, or of a label committee of the local union. In certain unions, however, in which the label has assumed great importance it has been found desirable to create special officials for the performance of this duty. The Cigar Makers thus have in recent years required local unions to elect officers known as "label custodians" whose

¹ Constitution, 1896, 14th ed., pp. 39-44.

duty it is to keep records of manufacturers using the label, their place of business, revenue district and factory numbers, number of hands employed, cigars manufactured, number of labels used each week, number of labels on hand on the first day of the month, number received during the month, those unfit for use, etc. Each month the label custodian must render a full report, which, after being examined and approved by the finance committee or joint auditing committee of the local union, must be sent to the International president.¹ "Any label custodian failing to mail a report to the International president within fifteen days after the expiration of each month shall be fined two dollars for the first offense; and for the second offense the sum of three dollars shall be imposed, and no labels shall be forwarded to said union until the conditions of this section are complied with."²

The Garment Workers require each district council to elect a "label secretary" who receives the labels from the general secretary and personally attends to their distribution. He fills out monthly a detailed statement showing the number of labels given to each shop, the location of each shop, and other similar details. Similarly, the Ladies' Garment Workers, an organization comprising local unions of cutters, tailors and trimmers, require the district council to elect a "label secretary" to manage locally the administration of the label. The Bakery and Confectionery Workers require each local union to elect a "label secretary" who "shall receive all orders for labels and immediately forward such orders to the General Secretary." "The label secretary is responsible for the delivery of all union labels. . . . He must keep books and strictly account for all labels delivered by him."³

A considerable number of the unions provide explicitly that only a quantity of labels sufficient for immediate use shall be given out. The Bakery and Confectionery Workers

¹ Constitution, 1896, 14th ed., pp. 39-44, Sec. 154.

² *Ibid.*, Sec. 155.

³ Constitution, 1909, p. 46.

limit the number of labels which may be furnished to any union bakery to no more than may be used in two weeks.¹ The Garment Workers and Ladies' Garment Workers make it the duty of the label secretary, "when labels are called for, to take the amount of labels required by the employer, visit the shop personally and satisfy himself as to the amount of work for which labels are wanted and hand them to the shop chairman."

The local officials in charge of the label are, of course, subject to discipline by the local unions if they fail in their duties, but they are also subject in some unions to discipline by the officers of the national union. Thus the Tobacco Workers provide that if either the label committee or the shop committee permit through neglect of their duties any irregularity, they shall be fined one dollar for the first offense, and two dollars for the second offense; also the local union may be fined five dollars for the first offense and twenty dollars for the second offense.² In others the amount of the fine is fixed by an International union rule. The Cigar Makers provide that "any label custodian, officer, or member charged with wrongful issuance of the label shall be fined if found guilty the sum of \$50 and forfeit the right of holding any office for a period of twenty years. Any person supplying any labels to a manufacturer or any other party not entitled to the same shall be fined \$200 and expelled from the union." The national officers may not only discipline local officials, but they may order the use of the label to be taken away from manufacturers if they are convinced that it is being used in violation of the rules.

The local officials are subject to supervision by the national officials. This is effected usually by a system of reports. The Cigar Makers have adapted their unique system of travelling auditors partly to the end of supervising the work of the label custodian and other local officials having charge of the label. It has been made the duty of these auditors "to examine and audit all books,

¹ Ibid.

² Constitution, 1900, pp. 41-42.

minutes and application blanks, containing a reference to the use of the label, make a comparison with the labels received from the International President and the number issued to manufacturers, and count the labels on hand and report the findings to the International President. Whenever deemed necessary they shall examine the revenue book of the manufacturers and compare the same with the labels furnished by the local custodian."

The final stage in the administration of the label is the oversight of the use of the label in the shop. Ordinarily local unions designate in each shop where their members work some member who represents the union, collects dues, and sees that the rules of the union are not violated. These officials go by various names, but are usually known as shop stewards, chairmen, or shop delegates. In practically all of the label-using local unions the shop steward is charged, in addition to his other duties, with the custody of the labels in his shop.¹ It is his duty to see that the proper number of labels are given out and that these labels are actually used on the goods manufactured in that particular shop; also that the conditions under which the label is granted are observed in the shop.

The Sheet Metal Workers, for example, furnish their labels through a "shop steward who must require from employers faithful compliance with all terms of the agreement for the use of the label. He must report any breach of the rules governing the use of the label to the local union or the International, and if he fails to do so shall be fined one dollar for the first offense and two dollars for the second offense. Local unions which fail to report such breaches of agreement to the International Secretary after the case has been reported may be fined five dollars for the first offense and twenty-five dollars for the second offense."²

The Garment Workers require the chairman of the cut-

¹ The Hatters require the appointment in each shop of a special official known as the "label steward" who has charge of the issue of labels.

² Constitution, 1905, pp. 34-35.

ting shop to count the garments cut and to register on a "label order statement" the number of each kind of garment. The "label order statement" is forwarded to the chairman of the tailoring shop, and he in turn counts the garments; if they tally with the count made by the chairman of the cutting shop, he countersigns this blank and forwards it to the label secretary for the amount of the labels required. The record of the firm as to the amount of work must also accompany this requisition for labels upon the label secretary of the local unions, and the two statements must correspond in every detail. The Shirt, Waist and Laundry Workers give to the shop steward of the making department charge of all labels.¹ This union also provides for the keeping of accurate accounts of the label by the making and cutting departments, and these accounts must tally in the report of the local label secretary to the general secretary of the International union.² The Hatters provide that the "label steward" of the finishing room shall distribute the labels, and "where hats are sent out in the rough" the steward shall "furnish a voucher stating the number of hats whether soft or stiff, also quality and color. He shall place the same in a voucher envelope, seal it and address it to the label steward of the factory where the hats are to be finished, said voucher shall be placed in the case or package with the hats. No label shall be given for hats coming into a factory in the rough unless the case or package containing them was first opened in the presence of the label steward of said shop."³ Label vouchers are not recognized after forty days from date of issue.

Finally, most label unions inflict some penalty upon an employer who violates the rules of the union with regard to the use of labels. The most elaborate of these rules is that of the Cigar Makers, which provides as follows: "Employers agreeing to use the union label and violating any of

¹ Constitution, 1905, p. 38.

² Constitution, 1903, pp. 23-26.

³ Constitution, 1906, Label Law No. 3, p. 34.

the conditions for use shall for the first offense be refused the use of the label until the employer deposits \$100 in cash with the union as a guarantee of faithful compliance in the future; but it shall be optional with local unions or joint label committees to return said deposits at the expiration of five years. For a second violation, the use of the label shall be refused for the space of six months and the amount deposited forfeited.”¹ “Any member of the union who is a manufacturer and violates any conditions for the use of the label shall be fined for the first offense the sum of \$25, payable within thirty days, for the second offense the sum of \$50.00 payable within sixty days, and for the third offense a fine of \$100 payable within ninety days shall be imposed.” The Hatters deprive any manufacturer of the use of the label for thirty days if he violates the label rules. Ordinarily, however, the national union leaves the local union or “joint council” free to withdraw the label or impose a penalty as it sees fit.

In a few unions the attempt has been made to secure the proper enforcement of the label rules by requiring that the labels shall be put on by a member of the union. The Glove Workers provide that the label “must be handled by union employes,” and if any doubt arises as to the use of the label, the International executive board may “employ a proper person to take charge of the label or the affixing thereof for a reasonable compensation by the firm.”² The Tailors require that the label “shall in no case be given to the merchant tailor to affix to the garments unless they are members of the Journeymen Tailors Union. The label shall be attached to the garments by the members making such garments.”³

¹ Constitution, 1896, 18th edition.

² Constitution, 1907, pp. 21-23.

³ Constitution, amended 1906, p. 41.

CHAPTER IV.

THE FINANCING OF THE LABEL.

In the successful use of the trade-union label financial considerations are of prime importance. Trade unions have two methods of defraying the expense incident to the issue of the label. They may either impose some part of the burden upon those employers who use the label, or they may defray the entire expense from the funds of the union. There are accordingly two forms of contracts regulating the use of the label: (*a*) those in which the trade unions assume entire financial responsibility therefor, as with the Cigar Makers, the Hatters, the Brush Makers, the Amalgamated Wood Workers, the Carriage and Wagon Workers, the Journeymen Horseshoers, the Typographical Union, in fact, the majority of American trade unions; and (*b*) those agreements drawn up between the employers and the unions providing for an apportionment of cost between the employers and the unions, as in the case of the Shirt, Waist and Laundry Workers and the Cloth Hat and Cap Makers.

The Shirt, Waist and Laundry Workers until 1909, when they relinquished jurisdiction over the workers engaged in making shirts and waists, charged shirt and waist manufacturers eighty-five cents per thousand for labels, although they did not charge laundries for the use of the stamp with which the label is imprinted on laundry bundles and on new collars and cuffs. The reason for this distinction was that the labels used on shirts are made of cloth and hence are expensive, while the rubber stamps used in impressing the label on collars and cuffs cost in the aggregate very little. Frequent complaints were registered with the union that the manufacturers were cutting the grade of material used in shirts because of the additional expense necessary for the use of the label. The union received from

firms using the label, from August 1, 1903, to July 1, 1904, \$2,328.90. From September 1, 1908, to September 1, 1909, \$1,337.60 was received from the same source. The Cloth Hat and Cap Makers also charge the employers for the use of their label.¹ The receipts from this source, however, are small, as in the case of the Shirt, Waist and Laundry Workers, but both unions have always been very weak, and even the small sum derived from the sale of labels has been important.

In the majority of label-using unions the national union assesses the cost of the labels on the local unions according to the number of labels used. The practise of thus assessing the local unions to defray the expense of furnishing labels is especially frequent among those unions which have shop cards or which imprint their label from a die or stamp. The Retail Clerks charge ten cents for each store card used. These cards are obtained by the local unions from the International secretary-treasurer upon payment of ten cents per card, and no charge is made by the local unions to the employers for their use. The badge of the association is furnished to the members of the union upon the deposit of fifty cents, and the secretary-treasurer of the national association is instructed to purchase the badges in such quantities "as to furnish them to locals at the lowest possible cost."² Similarly, the Barbers distribute their shop cards to the locals "in accordance with the price lists of the International Union."³ The Sheet Metal Workers furnish their labels at actual cost to the local unions. The shop cards are also furnished "by the General Secretary-Treasurer at cost to all locals in good standing."⁴ The Leather Workers on Horse Goods furnish their labels at cost to the locals.⁵ The Typographical Union distributes the electrotypes from which its label is imprinted to local unions or

¹ Proceedings of the Cloth Hat and Cap Makers, 1902, p. 5.

² Constitution, 1905, pp. 21-23.

³ Constitution, 1902, pp. 27-29.

⁴ Constitution, 1905, p. 34.

⁵ Constitution, 1904, pp. 28-29.

subordinate bodies on "receipt by the Secretary-Treasurer of a sum of money not exceeding ten per cent. above the actual cost and distribution of the labels."¹

A difficulty encountered in charging the local union for the cards or dies is that International control is thus to some extent lost in the administration of the label. Various unions have sought to guard against this by providing in their constitutions that although the local union be required to pay for the card or die, it shall remain the property of the International. The Meat Cutters and Butcher Workmen say in their constitution: "The label is not sold, but loaned, and remains the property of the International Secretary, subject to be returned at his demand or at any time. A charge is made for the use of the same to cover the cost of printing, mailing, etc." Similarly, the Travellers' Goods and Leather Novelty Workers provide that "the stamp label for leather work is to be the property of the International Union, although the locals shall pay the cost for each stamp ordered by them."²

The Hotel and Restaurant Employes charge local unions for shop cards and buttons, but the arrangement may be terminated whenever the International union finds evidence of their wrongful use.³ "All working buttons shall be leased to its members and can be demanded by the International or local at any time." The Union Bar Label and Union House Card "are only leased to locals and shall always remain the property of the International Union." The Painters, Decorators and Paper Hangers similarly provide that "all union labels shall be leased," and that "all labels furnished subordinate bodies shall remain the property" of the national union.⁴ The Journeymen Horse-shoers, however, exercising practically no International control over their label, will either furnish dies "at a cost of not more than sixty cents each," or they will allow local

¹ Constitution, 1905, pp. 56-58.

² Constitution, 1903, p. 13.

³ Constitution, 1905, pp. 23-24, 26-27.

⁴ Constitution, 1908, p. 54.

unions to "have their own labels produced by first securing from the International Union permission to do so," but the local union must furnish the International Union "with the address of the firm they employ to make such labels, also the number of labels they have made, and the number of shops in which the label is used or any information required in the making or use of the label."¹ The same Union is, however, more particular in providing for ownership of the badges or buttons which supplement the label as a mark of union labor. No local is allowed to secure more badges than there are members of the local. "A price not in excess of the cost of the badges (to furnish them) shall be charged to each member who desires to have the badge in his possession, but this cost price must not be construed as a purchase price; as the badge must always remain the property of the International Union."²

The success of the label, other things being equal, depends upon the control which the union exercises over it. When the union keeps the label entirely in its own control, it may act with greater freedom in initiating any policy of label agitation than it could under other conditions. Under such circumstances the trade union also is in a position to prosecute more effectively any infringement upon its label. The union demands as to wages, hours of labor, and working conditions of employment are of such primary importance that trade unions are ordinarily disinclined to modify the force of these by injecting financial questions relative to the use of the label. Those unions which may be taken as typical of the labor movement in the United States have accordingly adopted the policy of defraying all expenses incident to the issue of a label.

Those unions which have developed the greatest demand for the label have found it desirable to defray all the expense of printing the label from international funds. Thus,

¹ Constitution, 1907, Art. XXIV, Sec. 2.

² The International Horseshoers' Monthly Magazine, May, 1907, p. 31, Sec. 3-4.

the Cigar Makers furnish through the "shop committee man" of each local union labels free of charge.¹ The printing and distribution of the label is borne by the International union and defrayed from the general revenue of the organization, derived from the assessment of thirty cents per week upon each member.²

Far more important than the expense involved in making and distributing labels is the expense occasioned by agitation for its wider use. As has been noted in a preceding chapter the greater number, in fact all of the unions except half a dozen, leave the agitation for the use of the label almost entirely to the voluntary efforts of the local unions. The expenditures by the local unions of these international unions undoubtedly aggregate a large sum, but it is impossible to ascertain their amount or distribution.

The national unions which expend considerable funds for label agitation may be divided into two classes. In one, of which the Cigar Makers is the only example, the local unions are given a sum, varying according to the number of members, which they may use for label agitation. In the other the national unions expend directly the funds which they have devoted to advertising the label.

Local unions of Cigar Makers are allowed one dollar per capita on all fifteen and thirty cent contributing members per annum for label agitation by circulars, newspaper advertising, committees, etc., in their respective districts.³ The salaries of the organizers of the International union, part of whose duties it is to increase the use of the label by delivering free lectures, are defrayed directly by the International union. The Cigar Makers have even considered increasing the tax upon members for the advertisement of the label. In 1906 it was proposed to assess each member one dollar and fifty cents per year for this purpose alone,

¹ Constitution, 1896, 14th ed., pp. 39-44.

² *Ibid.*, sec. 70.

³ Constitution, 1896, 14th ed., p. 165.

and to use the one dollar per capita tax also.¹ The Cigar Makers occasionally levy extra assessments to meet the demands of special occasions. An assessment of ten cents per member was levied, yielding a total of \$4190.39, for advertising the label at the Lewis and Clark Exposition.²

Some local cigar makers' unions, in addition to the financial aid given by the national association, levy assessments for label agitation, either in connection with the work done by the national union or independently. Local Union Number 97 of Boston in 1906 assessed each member \$6.20 per annum for this purpose, netting \$12,400 per year. With the one dollar per capita tax from the international fund, a total of approximately \$15,000 has been spent annually by this organization in advertising the label.³ The one dollar per capita allowance from the international fund for label agitation fails to secure good results in the case of small locals, whose small membership produces only an insignificant fund for this purpose. In such districts the unions rely chiefly on the efforts of the International, although occasionally such unions by means of an additional tax raise a sum sufficient to make an effective campaign.

The following table shows the expenditures of the local unions of Cigar Makers as far as they are covered by the regular assessment levied by the International Union:

Year.	Expenses of Label Agitation.
1892	\$ 5,004.51
1893	6,624.84
1894	24,528.01
1895	26,306.12
1896	22,699.28
1897	25,363.36
1898	27,379.71
1899	28,440.16
1900	31,383.67
1901	38,563.85
1902	39,394.27
1903	44,339.82
1904	43,796.13
1905	41,724.29
1906	41,657.70
1907	42,296.71
1908	41,497.03
1909	39,791.94

¹ Cigar Makers' Journal, February, 1906, p. 3. The blue label

The other class of unions, as was noted above, expend directly for advertising their labels, leaving the local bodies to cooperate to the extent that they see fit. The unions which thus disburse considerable funds are the Garment Workers, the Typographical Union, the Shirt, Waist and Laundry Workers, and the Boot and Shoe Workers.

The total income of the Garment Workers for 1904 was \$179,833.46; of this amount \$51,264.75 was used for advertising, including the expense of a program of street-car advertising which proved a disastrous failure⁴ and led to a sharp reduction in the expenditures for label agitation. In 1907 the convention ordered a tax of three cents weekly for the specific purpose of label agitation. The union in 1908 had seventeen men on the road as label agitators and organizers, whose salaries were paid from this fund. The revenue of the Garment Workers in 1908 was only about one half of what it was in 1904, and the expense of label agitation cannot be separated since it is included in such items as advertising. In the fiscal year 1907-1908, the last for which reports are available, in a total expenditure of \$87,000 the following items occur: advertising, \$5,329.52; legal expenses \$2,365.79; organizing, \$33,768.27. A very large part of this expenditure—about forty per cent. of the total income of the union—was directly for the purpose of label agitation.⁵ The same proportion, viz., forty per cent. of the total income of the union is devoted to this purpose.

leagues occasionally devise financial schemes of their own. The New York Label League derived its revenue from a tax of five cents per month per member of all the unions affiliated. *Cigar Makers' Journal*, June, 1893, p. 9. The Nebraska Blue Label League secured money for label agitation from assessments of ten cents per month per member. This amount included, however, the one dollar per capita per member allowed local unions out of the general fund. Each local union affiliated held such money for label agitation as a separate fund, subject to the call from the secretary of the League, wherein was stated the purpose for which the money was to be expended. *Cigar Makers' Journal*, March, 1894, p. 10.

² *Cigar Makers' Journal*, May, 1906, pp. 6-7.

³ *Cigar Makers' Journal*, March, 1906, p. 7.

⁴ Proceedings of the United Garment Workers, 1904, p. 58.

⁵ Proceedings of the United Garment Workers, 1908, p. 9.

The Shirt, Waist and Laundry Workers levied in 1906 a per capita tax of fifteen cents weekly for the "general and strike fund." Two and one half cents of this fifteen cent weekly assessment was used for agitation of the label. This union spent in 1906 and 1907 for label agitators and advertisements of the label from \$4500 to \$5000 per annum.

The Boot and Shoe Workers in 1899 raised their dues from ten cents to twenty-five cents, one result of which was a more systematic advertisement of the label.¹ In 1909 the revenue of the union was at the rate of \$250,000 annually, making possible a vigorous advocacy of the label. From August 1, 1907, to May 21, 1909, the following sums were expended in advertising the label:²

Display boards	\$35,986.86
Daily newspapers	22,608.95
Trade union papers	20,295.24
Shoe trade papers	8,717.64
Blotters	3,207.25
Circulars	2,247.80
Buttons	2,632.35
Tapes	7,658.91
Moving picture show	10,887.34

During the same period the sum of \$33,610.67 was expended in the salaries of organizers who were chiefly engaged in promoting the demand for the label on shoes. Altogether, therefore, in the fiscal period under review the sum of \$150,000 approximately was expended in the label propaganda of the union, or about thirty per cent. of the entire expenditure of the union.

Until recently the Typographical Union has, as has been noted above, left the propaganda for the label entirely to the local unions. Since 1907, however, an increasing sum has been spent for this purpose by the national union.

¹ Proceedings of the Boot and Shoe Workers, 1907, p. 24, President's Report.

² Proceedings, 1909, p. 48.

From June 1, 1907, to May 31, 1908, \$7,844.51 was thus expended.¹

The legal questions raised in connection with the label are of some financial importance. The unions must be continually on guard against all cases of infringement. The Cigar Makers,² Sheet Metal Workers,³ and Tobacco Workers⁴ allow local unions "a sum not to exceed twenty-five dollars in addition to attorney's fees, for committee work in the prosecution of counterfeit label cases." The Print Cutters empower the national executive council to pay "a suitable reward to any person giving information of the illegal use of the label."⁵

In 1887 the Cigar Makers allowed the general executive board \$5000 per annum to prosecute all cases of infringement upon the label. The following table shows the amount expended by the Cigar Makers in attorneys' fees for prosecuting label cases for each year from 1892 to 1909:

Year.	Attorney's Fees.
1892	\$6328.00
1893	3815.25
1894	2336.44
1895	3093.85
1896	2670.70
1897	985.70
1898	1823.28
1899	1201.41
1900	1991.70
1901	1397.28

¹ The forms which this expenditure took were as follows:—

Circulars, cards, booklets, etc.	\$ 672.25
Blotters and stickers	2449.25
Miscellaneous advertising	50.50
Clerical and stenographic work	229.75
Postage stamps and stamped envelopes	1487.93
Special organization work	113.98
Printing for and services and expenses of organizer	217.60
Colored plates and pictures of home	1804.20
Expressage and freights	819.05
	<u>\$7844.51</u>

See Report of the Secretary-Treasurer to 54th session, 1908, p. 75.

² Constitution, 1896, 14th ed., pp. 39-44.

³ Constitution, 1905, pp. 34-35.

⁴ Constitution, 1900, pp. 41-43.

⁵ Constitution, 1904, pp. 11-12.

Year.	Attorney's fees.
1902	2407.81
1903	2943.39
1904	3316.67
1905	4007.12
1906	1087.00
1907	2051.05
1908	1066.95
1909	2474.33

CHAPTER V.

THE USE OF THE LABEL.

When the trade-union label was introduced, the conditions under which its use was to be granted were naturally not well settled. Each local union prescribed to a large extent its own conditions, and it has been only gradually that a certain agreement in policy has been reached. The history of the Cigar Makers' label will afford an illustration. Under the rules promulgated in September, 1880, and shortly thereafter, the labels were not to be used on tenement-house work, nor on work done at home in the evening since such work was regarded as essentially tenement-house work. The label was not to be placed on the work of apprentices since the legend on the label declared that the cigars were made by a first-class workman.¹ Finally, and most important, the label was to be used only on the work of unionists. If an employer hired both unionists and non-unionists, he must keep separate the goods made by the unionists in his employ.² Under these rules the local unions were left free to say on what terms they would allow an employer the use of the label. A local union might thus refuse to allow its members to work with non-unionists and so deny the use of the label to open shops.

Within a few months after the introduction of the Cigar Makers' label, propositions were made looking to the restriction of the use of the label to closed shops, and in 1883 this became a national rule. Labels have since then been furnished only to "strictly union shops." Under the policy thus formulated labels can be used only in union shops, i. e., in those shops which comply with all the working

¹ Journal, April, 1881, p. 3.

² Journal, October, 1880, p. 9.

rules of the local and national union and employ only members of the union.

The plan of restricting the use of the label to union shops has been adopted by all the label-using unions, and is the one requirement that is now universal. The Carriage and Wagon Workers require the shop to be "closed," and further state that the label shall not be used on any work unless "the same has been constructed in its entirety by members of the Carriage and Wagon Workers' International Union."¹ The Glove Workers in their stamp agreement contract to fill the places of any employes who shall be discharged for failure to abide by the provisions for arbitration or who shall be expelled from the union. In this way the union maintains the "closed shop," and also obligates itself to prevent any loss to the manufacturer because of lack of workmen.

The unions provide ordinarily with great detail that the piece of work must be made throughout in a union shop. The rules of the Hatters will serve as an illustration: "No manufacturer shall be allowed the use of the label that has a plank shop and buys his roughs in one shop and has them shaved, second sized, stiffened and blocked in his own shop. No manufacturer shall be allowed the use of the union label who has a plank shop and buys hats in the rough."² The Coopers provide that "on material and parts of tanks and vats made in a union shop and shipped to another locality an ink stamp shall be placed on each bottom and at least one stave for each tank or vat when it leaves the shop and if such material is set up or put together by members of the C. I. U. the tanks or vats shall be stamped in the regular way when finished."³ Such rules, however, apply only to the work over which the particular union claims jurisdiction, and in the case of some unions not even to that extent. The Boot and Shoe Workers, for

¹ Constitution, 1906, pp. 15-16.

² Constitution, 1906, p. 43.

³ Constitution, 1906, p. 14.

example, allow an employer to use the label although he has certain parts of the shoes made in non-union plants. The president of the union in 1906 thus defended this policy:

We still continue to meet members who contend that any given commodity is not union made unless all the various materials entering into its construction are made under union conditions. It would be so manifestly impossible to make any union commodity measure up to this standard, that it seems a waste of time to argue this self-evident proposition.

In our trade, we have jurisdiction over persons employed in the making of heels, counters, facings, etc., etc., and because this jurisdiction lies with our organization, some of our members insist that such supplies should be made under union conditions when used in the production of union stamp shoes.

We have made many and extraordinary efforts to organize the workers on shoe trade supplies above mentioned, but without any substantial success.

We can find manufacturers of shoe trade supplies who would be willing to organize their plant and use our label, providing we declare that union shoes shall not be made unless the supplies used shall be union made. This would furnish such shoe trade supply manufacturers with a practical monopoly if such a condition could be established; but I venture the assertion that they would quickly abandon their desire for the label on their supplies if it were found that manufacturers of shoes under this arrangement discontinued the union stamp and operated open factories in which this restriction would not be required.

We have said times without number that shoe manufacturers using the union stamp cannot be induced, not even through the value of the union stamp as a trade factor, to place themselves at a disadvantage in the market when purchasing shoe trade supplies; nor are they disposed to recognize a condition of this kind which will permit shoe supply manufacturers to exact an extra price in consideration of using the union stamp. We believe we are less able today to furnish union shoe trade supplies than we were at either the Detroit or Cincinnati Conventions, as notwithstanding our increase in membership, we have diminished in the number of persons employed on shoe findings, while during the same period we have gained in the number of members employed in the union shoe factories.

I see no alternative but to wait in the hope that with the general improvement in the degree of organization in the shoe trade a proportionate number of the shoe trade supply workers will be secured, and that eventually, the use of union made supplies will be possible.¹

The plan of confining the use of the label to shops which employ only unionists and observe all local and national rules results in making the union label stand for observance of union rules. It follows, therefore, that to describe the

¹ Proceedings, 7th convention, 1906, p. 22.

conditions for the use of the label would involve the description of all the various rules of the label-using unions. Such a task is beyond the aim of the present writer. But it is essential to bear in mind that the label stands primarily, not for any particular set of conditions, but for those conditions which the unions of each trade have found it possible and desirable to establish. In many unions these conditions are by no means uniform in all the local unions, and in no union are they entirely so. The shop card of the Barbers may be granted in Milwaukee on quite different conditions of employment from those on which it is granted in Louisville. In certain local unions where the administration of the national organization is weak the label is granted loosely. In some unions a system of national rules is in vogue, and where this is the case there is greater uniformity in the conditions for granting the label. It may be accepted, however, as a well settled principle among all the chief label-using unions that the label is granted only to those shops which observe union conditions as fixed by the local and national union and which employ only unionists. If a local union permits its members to work in open shops the national union will not ordinarily interfere, but the local union cannot allow such an employer the use of the label.

But the rule that labels shall be used only in union shops is the minimum requirement, and in those unions in which the label has become a larger factor a distinction is made between label-using union shops and other union shops, and extra conditions are imposed by the national union upon the latter. There are thus two classes of union shops, those shops regarded as such by the national union, and those regarded as such by the local union. The first class consists of the shops entitled to the use of the label because they obey certain national regulations, the second class consists of shops regarded as union shops by the local union. The matter may be made clearer by an illustration. The Barbers do not attempt to regulate by a national rule the number of apprentices in union offices, but they do re-

quire that "no shop displaying the union-shop card shall be allowed more than one apprentice at any one time." A local union may by its apprenticeship rule allow apprentices at the ratio of one to four, and a shop of twelve journeymen may have three apprentices and be in good standing with the local union, but it cannot have the union shop card. The members of the local union may work there and the proprietor may observe, as he will be required to do, the other union regulations, but to get the label he must reduce the number of his apprentices.¹

The greater part of these exceptional requirements for the use of the label group themselves around the following subjects: (a) wages, (b) sanitary regulations, (c) use of labor-saving devices, (d) hours of labor, (e) quality of product, (f) the requirement that certain classes of workmen shall be unionists, (g) the requirement that the employer shall unionize all his shops if he operates more than one, and that he shall not sell his goods to a manufacturer who does not use the label, (h) the one-man shop.

(a) *Wages*.—Comparatively few of the national trade unions in the United States fix a national minimum rate. Ordinarily the local unions may set any rate they see fit. Several of the more important label-using unions do set, however, a minimum rate for those shops which wish to use the union label. It is felt that the label is a national device and that local unions should not be allowed to exploit it. Thus the Cigar Makers provide that "in no case shall the union label be used in a factory in the United States which pays less than \$7.00 per thousand and not less than \$1.00 for packing per thousand and in Canada which pays less than \$6.00 per thousand for mold work—5 molds of

¹ Many of the rules laid down for the use of the label in the rules of the unions are not extra requirements, but merely iterations of national rules which apply to all union offices. Thus the Barbers, who do not admit women to membership and allow the use of the shop card only in union shops, provide expressly that "no shop card shall be issued to or displayed in any shop where females are engaged as barbers." Constitution, 1909, p. 32.

20 bunches.”¹ The Hatters provide that no shop shall be considered fair or entitled to the use of the union label unless the average wage of union members is at least three dollars per day.²

The Wood Workers in 1900 complained of the local rules whereby the label of the association was allowed to be used by firms which paid different rates of wages in different branches of the industry, and they also complained because the same rate of wages was not paid for the same kind of work in different cities. There was a total lack of uniformity in wage scales throughout the entire trade.³ In

¹ Constitution, 1896, 18th edition, p. 41. The reasons which led the Cigar Makers to adopt this rule were set forth by the president of the union in his address to the convention of 1896 as follows: “While conditions brought about by the prevailing adverse trade conditions should not be used as a criterion upon which to ground legislation for future control and regulation of the label, still the depression has developed a certain use for the label which I am convinced its framers and promoters never contemplated nor intended. Considerable complaint is heard from sections that are well organized and have a fair bill of prices—in effect that cigars bearing the label are sold in their midst at prices considerably below the prevailing market prices for similar goods.

“I have no hesitancy in asserting that several delegates here present are primed with complaints of this nature, and feel confident that this fact will be fully developed in the debates which will be heard when our deliberations shall have reached the subject of labels. However, I am convinced that a common ground must be found as a result of your combined wisdom, and needed legislation adopted that will have a tendency to minimize the evil, or else the label will fall into disrepute, and become a stumbling block instead of a help in the process of promoting and completely organizing the craft. As one means of rectifying the abuse, I recommend to your serious consideration the advisability of fixing a minimum price below which no cigars bearing the label shall be sold; and also legislation that will have the effect of absolutely proscribing the use of the label on cigars that are made in ‘turn in’ shops, subsidized factories, or rooms that are used as living apartments, leaving its economic value as a weapon to advance the standard of life for our trade, and its natural use entirely out of the question, and it can be safely stated that we have a moral and just right to so regulate its use that it shall not operate as a detriment or injury to one section, even though at the same time it be an alleged benefit to another section of the country. The label must be confined to its legitimate use. Any attempt to make it carry an inferior quality of cigars, or to further the ulterior interests of any individual or class must ultimately fail, and should at all times be discountenanced.” Report of President to the Twenty-first Session, 1896, p. 21.

² Constitution, 1906, p. 24.

³ Proceedings of the Amalgamated Wood Workers, 1900, p. 20.

1903 this union recognized a distinction between the work done in factories making sash, doors, and blinds and those factories engaged in the manufacture of saloon, office and bank fixtures. In the former factories twenty-five cents an hour was established as the minimum wage for both machine and bench men, and in the latter, twenty-two and a quarter cents per hour, with time and one half for overtime in all branches of the trade.

Another provision looking to the same end was made originally by the Cigar Makers and has since been adopted by the Piano and Organ Workers. It was as follows: "Manufacturers, their agents or representatives operating a shop or shops in any locality, establishing a shop or shops in any other locality shall not be allowed the use of the union label unless at least the same rate of wages, provided the new place has a lower rate of wages, is paid in the newly established shop or shops that prevail in the original shop or shops. Manufacturers, their agents or representatives shall not be allowed the use of the union label unless at least the same rate of wages shall be paid in the shop or shops of the former as is paid in the shops of the latter."¹ Here there is to be noted the feeling that a firm of manufacturers having built up a trade in a city where the scale is high should not be allowed to go afield to a cheaper manufacturing center.

In a few unions only those local unions which require the payment of at least a certain specified rate are allowed the use of the label. Here the distinction is not between label and non-label shops, but between certain classes of unions. For example, the International Typographical Union will not allow a local union to issue the label to any employer if the minimum weekly wage for any class of employee provided by its scale is less than \$12.

(b) *Sanitary Regulations.*—The Garment Workers provide in a general way that "all sanitary rules shall be ob-

¹ Cigar Makers' Constitution, 1896, 18th edition, p. 43; Piano and Organ Workers' Constitution, 1904, p. 24.

served in each shop using the label.”¹ The label is not granted to any firm to be “placed upon the whole or any part of its product if said firm cuts, trims and makes clothing under the contract system.”² Similarly, as has been noted above, the Cigar Makers do not allow the use of their label on cigars made in tenement houses.

(c) *Use of Labor-saving Devices.*—The Cigar Makers since 1893 have provided that “no union shall be allowed to furnish the labels for cigars made in whole or in part by machinery.”³ The Garment Workers will not allow the label to be issued to any firm using “perforated patterns in the cutting department.”⁴ Until recently the Coopers would not allow the label to be placed on “beer and ale work” if made by machinery. The union controlled to a considerable extent this class of work though the demand from unionists.⁵

(d) *Hours of Labor.*—In 1903 the Travellers’ Goods and Leather Novelty Workers provided that “on and after July 1st, 1904, the label will be granted only to firms where the nine hour day has been adopted.”⁶

(e) *Quality of Product.*—The Cigar Makers provide that the label shall not be “allowed on any cigars sold for less than \$20.00 per thousand. This shall not debar local unions from establishing a price above \$20.00 per thousand.”⁷ The Hatters provide that all members “having anything to do with the passing of hats after they are finished shall destroy all labels that may be found in rejected hats that will be sold to buyers of knock-downs.”⁸

(f) *The Extension of the Union’s Jurisdiction.*—In some trades there are certain classes of workmen as to whose proper inclusion within the union employers and unionists differ. The national union may not be desirous of compel-

¹ Constitution, 1908, p. 24.

² Ibid., p. 25.

³ Constitution, 1893, p. 34.

⁴ Constitution, 1908, p. 26.

⁵ Constitution, 1899, p. 34.

⁶ Constitution, 1904, p. 13.

⁷ Constitution, 1896, 18th edition, p. 42.

⁸ Constitution, 1906, p. 43.

ling local unions to insist on such inclusion. The label offers the means of introducing such a policy in some of the shops at least, with the least friction. An illustration may be drawn from the rules of the Cigar Makers. One of the aims of the Cigar Makers is to bring into the union the packers who place the cigars in the boxes. They have since 1898 made the label contribute to that end by providing that unless the packers in any particular shop are unionists the label may not be used. Similarly, the Coopers, who are now intent on bringing into the unions the operators of cooperage machines, provide that labels shall be furnished only to "strictly union shops," and that no shop shall be considered a strictly union shop unless all coopers and machine operators employed are members of the Coopers International Union.¹

(g) *The Unionizing of Other Shops.*—The most frequent of the extra requirements placed upon the use of the label are those which require an employer conducting more than one shop to unionize them all if he wishes the use of the label in one.

The Hatters refuse the use of the label to an employer who conducts a union shop if he also conducts a non-union shop.² The Broom Makers do not allow any manufacturer to use the label "who directly or indirectly deals in brooms or whisks manufactured in state, county, municipal, private, charitable or penal institutions."³ The Travellers' Goods and Leather Novelty Workers similarly provide that "manufacturers operating more than one shop shall not be allowed the use of the label unless all shops operated by such firms are strictly union shops."⁴ The Piano and Organ Workers have a similar provision.⁵ The Coopers provide less broadly that "manufacturers or their representatives operating more than one shop in the same locality shall not be allowed the use of the stamp unless all

¹ Constitution, 1906, p. 13.

² Constitution, 1906, p. 43.

³ Constitution, 1904, p. 32.

⁴ Constitution, 1903, p. 13.

⁵ Constitution, 1904, p. 24.

shops operated by the firm or its representatives are union shops.¹ A similar rule is that of the Coopers providing that no union shop shall be allowed to place the stamp on cooperage to be sold to non-union cooperage firms. In the same way the Cigar Makers will not permit a manufacturer to use the label if he sells cigars to a manufacturer "who is put on the unfair list or any agent or representative of such firm."

Such rules are intended to force a manufacturer who wants the use of the label on part of his product to unionize all his plants. It is also urged that since the name of a manufacturer is frequently well known, customers knowing that some of his goods bear the label may infer that all of his goods are union made. The latter purpose is responsible for another rule of the Cigar Makers: "Where the manufacturer deals in Chinese, tenement house or scab cigars, it shall be optional with local unions to withhold the label from such firm. It shall be optional with local unions to grant the union label to any manufacturer or firm whose name or firm name appears in or about the box containing Chinese, tenement house or scab cigars, or whose name or firm name appears on or about such non-union cigars." Even more to the point is the rule that "no brands of cigars made in both union and non-union shop shall be allowed to bear the union label."²

(h) *One-Man Shop*.—It happens that in several of the more important label-using unions there are large numbers of small shops, some of them so small that the proprietor is the only workman. It has always been a difficult question whether small shops and especially "one-man shops" should be allowed the use of the label. Obviously, no union can force an employer to pay himself a fixed rate. If, however, the union allows the small employer the use of the label, it makes it possible for the wage rate to be readily cut. The small employer sells his product, and to the extent that his own labor is embodied in it he may sell his

¹ Constitution, 1906, p. 13.

² Constitution, 1896, 18th edition, p. 43.

labor at any rate he pleases. The union cannot fix a price for the product. The enforcement of other rules, such as those regulating the hours of labor, is also very difficult in such shops. If a union grants the label freely to shops of any size, the label may become in those industries in which the advantage of large scale production is less pronounced merely a means for perpetuating the small shop.

On the other hand, such unions have been strongly averse to depriving the small employer, even the owner of the one-man shop, of the label. In the first place, the small proprietor is usually or frequently a member of the union. There is a strong feeling that he ought to be aided in his attempts to rise into the employing class. Moreover, the small shops can be made dependent on the union by granting them the label, and in case of a strike in the larger shops the expansion in the demand for workmen in the small shops is of great service to the union.

The union which has been most concerned with the one-man shop has been the Cigar Makers.¹ In April, 1881, the Aurora, Illinois, local union of the Cigar Makers' International Union presented to President Strasser the following question: "Is a cigar maker a union member in good standing, who starts in business for himself without employing any workman, entitled to use of the label?" The president decided that if a cigar maker, working for himself, had a retiring card, he was entitled to the use of the label provided he did not act against the rules of the union.² In 1881 the same policy was formulated in two rules: "Cigar makers who may be manufacturing for themselves, and who employ no hands shall be allowed the use of the union label, but they shall be required to pay the cost of the labels received. Such cigar makers as hold no retiring card can upon payment of \$10, receive the same by a vote of the local union." "In shops employing only union members in which the employers or foremen

¹ See below, p. —, for an account of the policy of the Typographical Union.

² Journal, May, 1881, p. 1.

work at the bench, the union may allow the use of the union label on all cigars made."¹ In 1886 a two-thirds vote was required for the granting of the union label to cigar makers not holding a retiring card, and since 1890 labels have not been issued to one-man shops unless the manufacturer holds a working card. More recently, local unions have been empowered to refuse to grant the use of the label to a manufacturer not employing any journeymen if he has not been a member of the union for at least one year. In 1909, therefore, the policy of the union toward small shops may be summarized as follows: One-man shops may have the label, but the manufacturer must be an active member of the union. In larger shops the label may be placed on the work of the employer if he employs only union workmen and does not "work more than eight hours per day."²

The Hatters will not grant the use of the label to a shop which does not employ at least one member of the union in good standing.³ The Glove Workers require that a label shop must have in its employ two or more members of the union.⁴ The Hotel and Restaurant Employees permit local unions to grant the label to any proprietor who is a passive member (i. e., who has once been a member of the union and has become "passive" because he has become a proprietor) provided he employs none but unionists when he needs extra or regular help.⁵ The Brush Makers require that one journeyman must be employed "all the year round" if a shop is to be granted the label.⁶ The Retail Clerks permit local "unions at their discretion to issue the International Store Card to small dealers who do not employ any clerks, but who do observe the closing hours demanded by the local."⁷

¹ Constitution, 1881, p. 19.

² Constitution, 1896, 18th edition, p. 42.

³ Constitution, 1906, p. 43.

⁴ Constitution, 1907, p. 22.

⁵ Constitution, 1909, p. 25.

⁶ Constitution, 1905, p. 26.

⁷ Constitution, 1903, p. 38.

CHAPTER VI.

THE DEMAND FOR THE LABEL.

The efficiency of the label as a device for establishing and maintaining union rules depends upon the extent of the demand which the label commands. The present chapter embraces a description of the methods of creating a demand for the label adopted by the more important label-using unions, an analysis of the elements influencing the demand for the label, and finally an estimate of the quantitative demand for the label in the few trades as to which such information is accessible.

Differences in the methods used in creating a demand for the label are chiefly due to differences in the classes of consumers whom it is hoped to reach. Especially in the early stage of the label movement the label was regarded as an appeal not merely to unionists, but also to the entire consuming public. The "white label" of the San Francisco Cigar Makers derived whatever force it possessed from the widespread opposition to Chinese labor. The International cigar makers' label also represented in 1883 opposition to the tenement-house system, which has always been strongly reprobated by many besides unionists. The Cigar Makers, therefore, could make a forcible appeal to the general public. Moreover, since the sanitary conditions were very bad in the tenement houses, the ordinary consumer could be appealed to on the ground that if he bought cigars without the label he was running the danger of infection. The Cigar Makers made much therefore, of the claim that the union label is a guarantee that the cigars were made under cleanly surroundings and that they were made by skilled workmen. The Garment Workers have always laid great stress on the claim that the goods on which their label is placed are made under sanitary con-

ditions. The Can Makers claimed that machine-made cans caused injury to health. The Boot and Shoe Workers rely partly upon the disinclination of the general public to purchase prison-made shoes.

Since in all these cases the label carries with it a significance over and above the mere fact that it is a mark of goods made under union conditions, the unions have attempted to reach the public at large by the ordinary channels of advertising. The Cigar Makers and the Boot and Shoe Workers use considerable quantities of bill-board advertising, and the Garment Workers, when they were financially stronger, spent large sums in magazine and streetcar advertising.

But the union label has come, as has already been indicated in another connection, to be more and more merely an appeal to unionists. It has not been found possible in many cases to stimulate a strong demand for label goods among non-unionists. Tenement-house labor is a lessening factor in the cigar and garment trades. The consumer not affiliated in some way with the trade union movement does not show great enthusiasm for a label which stands simply for union versus non-union conditions. More and more, therefore, the policy of agitation for the use of the label has come to be to increase and to intensify the demand among unionists for label goods, to make it a part of the creed of trade unionism that a unionist should buy union-made goods, or patronize only union shops. As a result the methods of creating a demand for the label have come to be more and more narrowly connected with the organs of publicity within the unions. Advertising in the trade-union journals, and the personal appeal to local unions and to conventions of national unions by agents of label using unions yield better results than newspaper or magazine advertising.

In the development of methods of creating a demand for the label as in the administration of the label there has been shown a strong tendency toward some central control. This has naturally manifested itself chiefly in those unions whose

products have the widest markets. The Cigar Makers during the early years of their organization entrusted the propaganda for the use of the label entirely to the local unions. From 1885 the president or the executive board of the Cigar Makers was authorized to levy upon each member of the union a sum not to exceed twenty-five cents per year. The sum thus realized, rarely amounting to more than \$5000 per annum, was applied by the national officials to advertising the label. It was assumed that the local unions by special assessments would provide for a local campaign. In 1889, however, the president of the Cigar Makers in his report to the eighteenth convention lamented the lack of any continuous policy of label agitation on the part of some of the locals, and in 1891 the convention ordered that the twenty-five cent assessment should be retained by the local unions. In 1893 each local union was allowed annually one dollar per capita from the general fund to be expended in advertising the label. The general officers also spend funds for advertising in one form or another.¹ In general, however, the Cigar Makers rely upon giving each local union a specified sum, since they believe that local agitation is most effective. The Garment Workers, the Hatters, the Boot and Shoe Workers, the Jewelry Workers, and the Butcher Workmen carry on the label propaganda almost entirely through the national organizations.

The remaining unions rely almost entirely on the local unions to create a demand for the label, although there is a growing tendency even for those unions whose products have only a local market to aid in advertising the label. The Typographical Union furnishes an illustration. The change in the policies of that union has been described by a recent writer as follows:²

"Until very recently the task of increasing the demand for the label was imposed entirely upon the local unions. Although the International officers from 1894 to 1900 repeatedly advised that con-

¹ For an account of the expenditures, see above, p. 46.

² Barnett, G. E., *The Printers, A Study in American Trade Unionism*, pp. 275-276.

siderable sums should be spent in advertising the label, the session steadily refused to expend International funds for that purpose. In 1901 President Lynch began systematic efforts to incite the local unions to a more active propaganda for the use of the label, and instructions and plans for advertising the label were furnished. The interest thus aroused led the session of 1903 to authorize the executive council to devise a plan for a "national label fund"; but, in view of other increases in expenditure at the time, the council believed that it would be unwise to present to the membership a proposal for an assessment for a label campaign. The first large International expenditures for the label propaganda were made during the strike for the eight-hour day in 1905-1907, when the local unions were furnished with enormous quantities of printed slips known as "stickers." These were distributed to members and other interested persons, who were asked to attach one to any piece of printed matter without the label which came into their hands, and to return it to the issuer. On the "sticker" was a notice that the piece of matter to which it was affixed was returned because it did not bear the label. The session of 1907 indorsed the action of the officers in thus inaugurating an International propaganda; and in 1908 the International president was authorized to employ a label agent who should devote his time to the campaign."

The creation of a demand for label goods does not depend solely upon the efforts of each union to advertise its own label. In some cases the unions have combined in efforts to stimulate the demand for label products, the most notable of these combinations being the "label leagues" which have been formed in many sections of the country. The first of these was formed in Denver in 1903, and by 1907 such leagues, composed of representatives from the local unions in each city, were in operation in some ten cities, and in the same year the American Federation of Labor recommended the organization of leagues wherever possible. Since about 1901 Women's Label Leagues have been organized in various cities. The membership of these leagues is limited to women trade unionists or the women relatives of trade unionists, and their appeal, like that of the label leagues, is directed primarily to the trade-union consuming public. In 1903 these women's leagues were organized into the Women's International Union Label League, and on several occasions the American Federation of Labor has urged the local leagues to affiliate with the International League.

The Consumers' League movement may be considered an

aid to the union label propaganda in that it has tended to spread the idea that the consumer should direct his purchase in such a way as to better industrial conditions.¹ The label of the league is placed only on women's wearing apparel. The Ladies' Garment Workers on several occasions have complained that the label of the league is given on conditions not satisfactory to that union. In 1903 President Gompers of the American Federation of Labor said in his annual address: "In connection with this question of labels should be mentioned the fact that in some cities some well meaning, philanthropic ladies have organized consumers' leagues. These leagues were originally intended to be helpful to securing amelioration in the condition of some of the working people. Lately some of these leagues have issued a label to employers simply because the sanitary conditions in which the employees work were improved, and these labels issued without regard to any consideration as to wages, hours, and other conditions of employment, and in some instances in rivalry to the union label of the organization of the craft."² More recently, however, the relations of the Consumers' League and the Ladies' Garment Workers have improved, and at present there seems to be no friction.

The methods of advertising the label are, of course, numerous. Perhaps the most effective has been the insertion of facsimiles of labels in the trade-union journals. Practically every national union has its journal, and as a rule these journals sell space at very low rates. The Hatters and Cigar Makers have made much use of illustrated lectures in their label propaganda. Special lecturers give their entire time to this work. Souvenirs and novelties of many kinds have been used as advertisements by some of the unions. The Hatters have at times given away appropriately marked pencils, calendars, and buttons. The

¹"The use of the label," says the Industrial Commission, "is increased by consumers' leagues and like organizations among women. The price of the article may be increased but the demand among the better sort of trade keeps pace."

²Proceedings of American Federation of Labor, 1903, p. 22.

Boot and Shoe Workers have given away thousands of tape lines. The Cigar Makers use match boxes and cards for the same purpose. In 1908 the Boot and Shoe Workers sent out a moving picture show to advertise their label.¹ In labor parades floats representing some particularly obnoxious form of competition such as prison labor or teneement-house work in a particular trade, and presenting facsimiles of the label of the union, are frequently employed by these unions for the "education" of the public.

There are, of course, many unusual and curious advertising schemes for increasing the demand for the label. The Western Laborer of Omaha and the Union Label and Home Industry League of that city, for example, offered to publish lists of all merchants handling union-made goods, of the articles in stock, and the prices. Some manufacturers have assisted the unions in advertising the label. The immediate purpose has usually been to create a market for the goods of the manufacturer by associating his name intimately with the union label. It has also occasionally happened that a manufacturer has offered to pay a percentage to the union whose members collected union labels by buying his goods.²

It has been proposed that the trade unionists, irrespective of occupation, should be organized by wards. The members of the different unions would thus be brought together for discussion primarily as to the best means to be employed in advertising the label. All matters of political nature are to be avoided at such meetings.³ It is believed by the advocates of this plan that such organizations would

¹ The president of the union in his address to the convention of 1909 said: "We have since the last convention maintained a picture machine show constantly on the road during the fall, winter and spring months. This company consists of an advance agent, a lecturer, a picture machine operator, vocalist and musician. This company has covered the principal cities and towns in the states of Illinois, Wisconsin, Minnesota, Iowa, Ohio, Pennsylvania, Georgia, Tennessee, Louisiana, and Texas."

² *Proceedings of the Travellers' Goods and Leather Novelty Workers*, 1903, p. 24.

³ *The Weekly Bulletin of the Clothing Trades*, November 10, 1906, p. 8.

bring to bear great pressure on local merchants to sell only label goods. This proposal has never been seriously considered because the interest in the label is not strong enough to afford the basis for such an organization as is contemplated. The plan of establishing cooperative stores where only union products should be sold was proposed at the convention of the Boot and Shoe Workers in 1896. The committee reported unfavorably, but again at the convention of 1897 the same plan was urged. The convention, however, rejected it by a large majority.

The unions have not confined themselves to arguments, but have developed coercive methods for increasing the sale of label goods. The Boot and Shoe Workers, for example, fine any member purchasing shoes without the union stamp or any other commodity without the union label, whenever it can be procured. The Hatters in the convention of 1900 resolved to fine every one of their members five dollars who should purchase a non-union cigar. They at the same time authorized the levying of a fine of five dollars upon anyone buying "any head covering that did not have the union label." Similar rules may be found in many of the national unions and in hundreds of local unions. That they cannot very well be enforced does not prevent their enactment. It is argued that such rules bring home forcibly to the members their obligation to buy union-made goods. Another form of the same idea is found in the rule adopted by the Retail Clerks in certain cities, particularly in Ohio, Pennsylvania, and Illinois, where the Clerks are better organized, that each union clerk shall be fined for selling certain kinds of goods not bearing the label. This particular device has proved effective in those districts where strong union sentiment prevails; but the Clerks are in most cities very weak and could not enforce such rules.

Whether or not a trade union can establish a demand for goods bearing its label depends upon a variety of factors: (1) on whether the goods are bought by unionists or by other classes in the community; (2) on whether the goods are ordinarily purchased by men or women; (3) on

whether the goods are of such a character or are purchased under such circumstances as to make it possible for other unionists to know whether the unionist purchasing the goods is buying union or non-union goods, and (4) on whether the purchase is one frequently repeated or only one made at considerable intervals. The influence of these factors will be considered in this order.

(1) As has already been noted, the unions have for some years almost entirely abandoned the attempt to promote the demand for label goods among those sections of the purchasing public not closely identified by sympathy with the unions. The only important exception to this general rule is in the case of the Printers' label. The Allied Printing Trades' label is frequently seen on the printed matter of merchants and other persons who do not preferentially buy other label goods. This exception is, however, more apparent than real. A recent writer has thus explained this apparent anomaly:¹

"The use of the label by the Printers as a means of directing the patronage for goods to union offices differs in an important particular from its use by other trade unions. The labels of the Hatters and Cigar Makers are primarily intended to enable a purchaser to identify union-made goods. The chief purpose of Printers' label, on the other hand, is to indicate to others than the customer that the work was done in a union office. This difference grows out of certain peculiarities of the demand for printed matter. Roughly speaking, we may say that newspapers, magazines, and books are produced for sale, while other kinds of printed matter are executed either for the use of the customer of the printing office or for free distribution. It has been found that the boycott is a far more effective device than the label in diverting patronage from newspapers and magazines. The use of the label on books has never been of importance, although the publishers of some subscription books which appeal particularly to the working classes have found it desirable to use the label.

The demand for printed matter intended for the immediate use of the customer or for free distribution does not come largely from the trade unionists. The Printers' label, therefore, if it were merely a mark of identification for the customer, would have comparatively little effect upon the direction of this patronage. The trade unions and some lodges and associations have the label placed on their printed matter because they wish to aid the Printers in enforcing their trade regulations. Under such circumstances a customer is

¹Barnett, G. E., *The Printers, A Study in American Trade Unionism*, p. 276.

able to make sure that his patronage goes to union offices by requiring that the label shall be placed on his printed matter. The Printers' label, is, therefore, an aid to the customer in distinguishing union from non-union offices, but it is not an indispensable device for this purpose as the label is in the case of hats and cigars, where the goods are not made to order. A customer may ascertain without the test of the label whether the printing office which he patronizes is or is not a union office.

The Printers' label is chiefly useful as a device for influencing the patronage of those customers of printing offices who intend to distribute printed matter. Such customers, if they wish to conciliate trade union sentiment, may be influenced to ask that the label be placed on their printed matter. The "sticker" has, therefore, logically become the chief instrument in the propaganda for the use of the label. It calls the attention of the issuer of printed matter to the fact that he has not shown his friendliness to organized labor and is in effect a veiled threat of boycott. The label is on this account usually found on the circulars of candidates for public office, on baseball advertising, and on the advertisements of shows. In 1908 the first vice-president of the International made a vigorous effort to induce certain insurance companies to have their printing done in union offices. In all these cases, the real force depended upon to secure the use of the label, and, as a result, patronage for union offices is the fear on the part of the distributor of printed matter that if he does not use the label he will lose the patronage of unionists. A case cited in the *Typographical Journal* (Vol. 30, p. 234) will serve as an illustration. A manufacturer of musical instruments conducted also a non-union printing office. "Stickers" were sent to the musicians' unions throughout the country with the request that they return the advertising matter of the manufacturer with "stickers" attached. By this means, the printing office was unionized."

The general rule that label goods are demanded chiefly by unionists is strikingly illustrated by the differences in the demand for such goods in different sections of the country. Where large manufacturing or mining interests absorb a large part of the attention of the population and the workers are well organized, as in the coal fields of Pennsylvania and the Middle West, in the mines of the Western States, or in the manufacturing towns of the Middle West, the demand for label goods is more than proportionately strong. The aggregation of large numbers of unionists produces an intensity of pro-union feeling which contributes greatly to the sale of label goods. For the same reason there is no considerable demand for the label on the more expensive grades of goods. Cigars selling at over ten cents rarely have the label. The majority of hats hav-

ing the label are of middle quality. The best grades of hats, even though made in union factories, do not carry the label, for purchasers of hats at five dollars and over would be more likely to be repelled than attracted by the label.

(2) It is of prime importance, if the demand for the label goods of a union is to be strong, that the purchase of the particular goods should be made by the men and not the women of the family. It would be difficult to name a single article ordinarily purchased by women in which there is a strong demand for label goods. This is a fact of great importance, since a very large part of the ordinary workingman's income, to say nothing of the income of working women, is expended by the women of the household. It is the experience of the unions that the wives of trade-unionists do not insist on having the label on the articles which they purchase. The Broom Makers and the Brush-makers are peculiarly affected by this condition. The Boot and Shoe Workers have found that the demand for the label on women's shoes is far less than on men's shoes. The Butcher Workmen testify to the great difficulty in inducing the wives of unionists to buy meat only from butchers exhibiting the union market card. The Ladies' Garment Workers who make garments for women's wear are most seriously affected, and the label in this trade has never been important. It is not within the province of the present writer to offer any thorough-going explanation of this attitude on the part of the women of trade-union families. It is partly the result of lack of information concerning the union label, partly the result of the smaller acquaintance of women with industrial conditions. It may be, however, that the ultimate explanation is to be found in some fundamental peculiarity in the attitude of women toward combination for economic purposes. The difficulty in inducing women to demand label goods has its counterpart in the difficulty encountered in organizing working women into effective unions. The unions hope that the Women's

Label Leagues noted above will bring about a change in the attitude of women toward the label.¹

(3) A very large part of the demand for label goods depends upon the pressure of union opinion. Many trade unionists buy label goods not because they believe in the label as an instrument for advancing the interests of the wage earners, but because they fear the reprobation of their fellow unionists if they do not do so. One element of strength in the Cigar Makers' and Brewery Workers' labels lies in the fact that a certain publicity ordinarily attends the purchase of cigars or beer. It is matter of frequent complaint among the Cigar makers that although unionists when in groups almost always buy union-made cigars, they are not so careful when they are alone and in places where the character of their purchases is not likely to be noted. It is one of the elements of weakness in the demand for the Cigar Makers' label that the label is not and cannot very well be imprinted or pasted on the cigar. A trade unionist having purchased a cigar or several cigars of non-union make does not fear detection by his fellow unionists. It is only at the time of purchase that pressure can be exerted. On the contrary, articles of wearing apparel such as hats, shoes, and garments have labels durably placed on them, and if a unionist has purchased a hat without the label some untoward chance may at any time reveal the fact to his fellow unionists.

(4) A final factor in the demand for the label and one of great importance is whether the purchase is one made frequently or at considerable intervals. The purchase of cigars, hats, shoes or garments is a recurring act, while the purchase of many other goods used by unionists is only infrequently made, perhaps once or twice in a life-time. In the former case the unionist learns to associate the label with the particular commodity, and successive purchases strengthen the habit of asking for goods bearing the label

¹ In 1907 there was organized in Jersey City a school for teaching women how to recognize union made goods; see *Barbers' Journal*, February, 1907, p. 8.

of a particular union. In the case of articles purchased only at long intervals, as for instance a kitchen range, the unionist has probably not had his attention drawn to the fact that there is a label on such goods. He may have seen advertisements of the label of the Molders and Stove Mounters many times, but it is more than likely that at those times he was not contemplating such a purchase and the advertisements did not excite his interest. The consumer of cigars, on the other hand, applies immediately to his own experience the advertisements of the "blue label."

The difficulty of creating any considerable demand for the label in the case of goods bought only infrequently may be illustrated from the experience of the Molders. A label was adopted by the Molders in 1887, but no considerable effort to create a demand for molders' products bearing the label was made until 1894, when a vigorous campaign was inaugurated to create a demand for union-made stoves. It has always been admitted that it is useless to attempt to create a demand for the label on machinery castings,¹ but it was thought practicable to build up a demand for the label on stoves, since unionists are large purchasers of such goods. The reports of the officials since that time consistently complain that these efforts have been ineffectual. The officers attribute the failure of the propaganda to various causes, nearly all of which may be resolved into the fundamental difficulty that purchasers buy stoves only at considerable intervals. In 1895 the president of the union said: "While the cigar-makers, printers, and other organizations can point with pride to the success of their label, we are unable to do the same, and I find it is because the conditions in those trades are more favorable than in ours. The purchase of a cigar calls for a small expenditure of money,

¹ In 1895 the president of the Molders in his annual address said, "Placing the label on castings and specialty goods has not been successful because of the fact that castings promiscuously made leave the foundry in an unfinished condition, and are handled by others, and when leaving their hands have no evidence of make discernible because of the process they are put through to bring them to a finished state."

and that, too, by a man who may or may not belong to a union; and the same can also be said of a bill for printing, which, if the label does not appear upon it, it is the purchaser's option to decline, as union-labeled cigars and printing can be had almost anywhere. But not so with a stove, which, besides calling for a considerable outlay of money, is generally bought by women, who, no doubt, are controlled more by the price than any other consideration. Besides this, stoves of certain makes and names have, on account of their superior advantages, established for themselves a trade which the dealers find greatly to their advantage in supplying, because of the demand made for them by their customers, who will have no other." More recently the Molders have practically abandoned the attempt to encourage a demand for the label on stoves, partly because the trade is well organized and partly because the association of manufacturers in the trade object to using the label.¹

In the preceding discussion of the factors determining the demand for label goods the more general factors—price and quality—have been passed over, because they play an extremely minor role in the demand for label goods. The unions ordinarily claim that the retail price of label goods is no greater than that of goods made by non-unionists, and it seems probable that in most cases this claim is well founded. The difference in the cost of production of the two classes of goods is so small as not to be reflected in the price. In the case of cigars the price paid for making is ordinarily considerably higher in union than in non-union factories. In the "Report on the Limitation and Restriction of Output" published in 1904 as a Special Report of the Commissioner of Labor, it is said, "In perhaps every locality wages in union cigar factories are

¹ For an account of the negotiations concerning the use of the label between the Molders and the National Defense Association, see Hilbert, F. W., "Agreements in Iron Molders' Union," in "Studies in American Trade Unionism," edited by Hollander, J. H., and Barnett, G. E.

higher than wages in non-union cigar factories; and in many cases the wages per thousand cigars are from \$3 to \$5 more in union than non-union factories."

It must be taken into account, however, that the manufacturer of label goods is aided in selling his goods by the union, and to that extent he can dispense with advertising. It is claimed for the Cigar Makers that on this account label cigars, although costing more to manufacture, are sold as cheaply as cigars of the same grade made by non-unionists. Of course, if all the manufacturers in any particular industry had the use of the label it would not serve as a valuable advertisement. Where, however, the article is one in considerable demand by unionists and the union in the trade is able to create a demand for label goods, a small number of the manufacturers may receive an advertising advantage from the use of the label which will more than compensate for the higher cost of production entailed by the compliance with union rules.

The unions have not as a rule attempted to encourage the demand for label goods by making the label a mark of superior material or workmanship. The difficulty in the way of any such plan is obvious; the union is not organized to further the interest of any particular part of the workmen in the trade, but to establish conditions for the trade as a whole. If it made of its label simply an instrument for aiding those workers employed on fine goods, its power would be restricted. As a general rule, therefore, the unions do not make their propaganda for the label on the ground that the goods bought are of superior quality. The purchaser has, of course, in buying label goods the guarantee that they were not made in a prison or in a tenement house. He knows, moreover, that the goods were made by a unionist.

In a few unions, however, there are specific rules requiring that goods bearing the label shall not be below a certain grade or quality. Such, for example, are the rules of the Cigar Makers and of the Hatters, already noted. The Cigar Makers will not allow the use of the label on grades

of cigars selling for less, at wholesale, than \$20 per thousand. The Hatters will not allow the use of the label on hats made by pasting or sewing brims and crowns together.¹ The Jewelry Workers require as one of the conditions for the use of the label that the employer shall agree "that the Union Label shall not be stamped upon any article which bears any false or untrue karat stamp, or other stamp indicating the quality of the article so stamped, intended to mislead the purchaser of said article." The Jewelry Workers are able, therefore, to appeal to consumers on the ground that the goods on which their label appears are correctly marked. The effectiveness of this appeal has been much lessened by the recent enactment of a federal law prohibiting the "carriage in inter-state commerce of falsely or spuriously stamped articles made of gold or silver or their alloys." Several of the States have also passed legislation with the same end in view. Colorado, for example, in 1907, passed a law whereby "a fine of fifty dollars or ninety days' imprisonment, or a fine of one hundred and fifty dollars and imprisonment" is the penalty for fraudulently stamping "any article of gold or silver or their alloy."

In conclusion, it would be interesting to know how far the product bears the label in those trades in which the unions rely most upon the label. Unfortunately the information obtainable on this point is very meagre. Perhaps the most nearly exact statement can be made with reference to the Cigar Makers. The table on the following page shows the extent to which the cigars made in the United States bear the label.

The United Hatters, who have been able to create a very strong demand for their label, had distributed, according to their last available report, from 1885 to July 1, 1908, 254,154,394 labels, or an annual average of about 11,000,000 labels. In the years 1907 and 1908 the annual distribution was at the rate of 18,000,000 labels. It is impossible

¹ Journal of the United Hatters, December, 1903, p. 16.

NUMBER OF ESTABLISHMENTS, CIGARS MANUFACTURED, AND CIGARS
LABELED, BY YEARS.¹

[Cigars weighing more than 3 pounds per thousand].

Year.	Number of Establishments in the United States.	Number of Cigars Manufactured in the United States.	Number of Labels Issued by the Cigar Makers' International Union.	Number of Cigars Labeled, Estimated at 50 to the Label.
1881	16,640	2,805,769,926	1,590,000	79,500,000
1882	16,663	3,117,860,952	3,600,000	180,000,000
1883	17,394	3,231,813,286	4,450,000	222,500,000
1884	18,672	3,372,982,038	5,000,000	250,000,000
1885	20,961	3,293,662,991	5,332,000	266,600,000
1886	21,053	3,462,014,287	15,042,000	752,110,000
1887	21,274	3,661,630,422	15,800,000	790,000,000
1888	22,055	3,668,162,486	13,400,000	670,000,000
1889	22,837	3,787,229,453	14,028,000	701,400,000
1890	23,119	4,228,528,258	14,506,000	725,300,000
1891	24,728	4,422,024,212	14,050,000	752,500,000
1892	25,246	4,674,708,260	18,405,000	920,250,000
1893	26,663	4,341,240,981	18,200,800	910,040,000
1894	29,173	4,163,641,327	16,100,000	805,000,000
1895	30,072	4,099,137,855	16,200,000	810,000,000
1896	31,401	4,048,463,306	17,093,000	854,650,000
1897	31,435	4,135,594,125	16,725,000	836,250,000
1898	30,517	4,456,836,966	15,460,000	773,000,000
1899	28,523	4,909,566,840	18,310,000	915,500,000
1900	27,366	5,565,669,701	22,315,000	1,115,750,000
1901	24,567	6,139,390,776	21,688,446	1,084,422,300
1902	26,940	6,907,830,553	27,956,540	1,397,827,000
1903	26,456	6,806,017,429	32,961,000	1,648,050,000
1904	27,703	6,640,482,283	29,890,000	1,494,500,000
1905	26,631	6,747,869,277	29,800,900	1,490,045,000
1906	25,812	7,147,548,312	30,250,000	1,512,500,000
1907	23,882	7,302,029,811	31,590,000	1,579,500,000
1908	22,868	6,488,907,269	27,201,500	1,360,075,000
1909			26,390,000	1,319,500,000

to ascertain the production of hats in the United States, but it is conservatively estimated at 30,000,000 per annum. This estimate does not include straw and cloth hats, which are not made by the United Hatters. The Boot and Shoe Workers do not keep any account of the number of stamped pairs of shoes, since the stamp is imprinted from a die.

¹ This table for the years prior to 1904 is taken from the Eleventh Special Report of the Commissioner of Labor on "Regulation and Restriction of Output," p. 584. From 1904 to 1909 the figures for the number of establishments and the number of cigars manufactured have been taken from the report, of the collector of internal revenue, and the figures for the number of labels issued have been furnished by Mr. Geo. W. Perkins, President of the International Cigar Makers' Union.

CHAPTER VII.

TRADE JURISDICTION AND THE LABEL.

In the foregoing chapters it has been assumed that the product of each union using the label is separate and distinct from the product of every other label-using union, and that each union has an undisputed exclusive right as against every other union to organize the workers on a particular product. Neither of these assumptions is entirely correct, and frequent disputes among the unions have been the result.

The difficulties encountered may be divided into three classes: (*a*) where the members of two trades claim the right to do the same work and to place their label on the product, (*b*) where the product is one made by workmen of several distinct trades each of which claim the right to participate in the regulation of the label, (*c*) where certain trades are essentially subsidiary.

(*a*) The difficulty between the Journeymen Tailors and the United Garment Workers as to the right to organize particular classes of workers in the garment trade illustrates the first class of disputes. The United Garment Workers have jurisdiction over all garment workers working in clothing factories, while the Journeymen Tailors have jurisdiction over workers employed on custom-made clothing. The distinction between the two classes of workers was once fairly clear, but in process of time much, probably most, custom-made clothing has come to be made on the factory system. As a result a dispute arose as to which of the unions had the exclusive right to organize the group of workers lying midway between the two older classes, and as to which of the unions had the right to place its label on the product.

On October 9, 1903, at a conference in Washington be-

tween the representatives of the two organizations an agreement was concluded. By the terms of this agreement each union agreed not to boycott any clothing bearing the label of the other organization, and the jurisdiction of the unions was determined on the basis of the selling price of the product. "Workmen engaged in making custom made clothing for merchant tailors either under the Journeymen Tailors' idea or by factory system, the selling price for which clothing in the United States shall average twenty-five dollars, and in Canada eighteen dollars, these workmen come under the jurisdiction of the Journeymen Tailors' Union; while those workmen engaged in custom work under the factory system for merchant tailors in the United States, and the selling price being below twenty-five dollars and in Canada below eighteen dollars on ready made clothing, shall come under the jurisdiction of the United Garment Workers of America. The label of either organization is forbidden to firms which make clothing under the factory system and do not own their shops."¹ The Journeymen Tailors and the Garment Workers were to use but one form of label on ready-made clothing and overalls. The label of each branch of the trade was to be distinguished by a special stamp. The general executive boards of the two unions were granted the power to adopt proper means for the identification of the two different uses of the same form of label, inasmuch as no agreement was reached at the conference between the officials of the two unions as to the exact form of stamp to be used. This agreement has not worked satisfactorily, however, and in 1909 the Tailors asked the Federation of Labor to grant them jurisdiction "over all workers engaged in the manufacture of legitimate custom tailoring no matter what system of work is used."²

Somewhat more complicated disputes but of the same general character were those of the Shirt, Waist and Laundry Workers with the Ladies' Garment Workers and with the United Garment Workers. The Shirt, Waist and Laundry

¹ *The Tailor*, November, 1903, p. 9.

² *Proceedings of American Federation of Labor*, 1909, p. 125.

Workers claimed jurisdiction as follows: "We are, first, a Laundry Workers' International Union and are composed of members working on new factory and old custom laundry work, both in shirt and waist factory laundries, as well as in custom and old work laundries, and those employed in "cutting and making" shirts, waists, collars and all things that require laundering and that come in direct touch with the laundry workers, must, for the success of our movement come under the banner of the Shirt, Waist and Laundry Workers' International Union."¹ On the other hand, the Ladies' Garment Workers claimed jurisdiction, involving the right to use the label, over the workers on waists, and the Garment Workers claimed jurisdiction over the workers on shirts.

Jurisdictional agreements were concluded in both cases in 1903-1904. All workers engaged in the manufacture of waists were to belong to the Ladies' Garment Workers Union, and the Shirt, Waist and Laundry Workers agreed not to charter local unions of such workers. In cities where both shirts and ladies' garments were made, if the workers were sufficient in number the workers on shirts were to join a local union of the Shirt, Waist and Laundry Workers, while the workers on Ladies' garments were to join a union of the Ladies' Garment Workers. Each union was to issue its label through its own officers. Factories were not to have the use of the label of the International Ladies' Garment Workers Union on wash goods unless they were laundered by members of the Shirt, Waist and Laundry Workers' Union.² If the workers in the industry were not strong enough to support a separate local union, they were to be organized into a single union and attached, according to the relative number of shirt and waist makers employed, either to the Shirt, Waist and Laundry Workers' Union or to Ladies' Garment Workers' Union.³

¹ Proceedings of American Federation of Labor, 1902, p. 76.

² Official Journal of the Shirt, Waist and Laundry Workers, August 1904, p. 21.

³ Proceedings of the Shirt, Waist and Laundry Workers, 1904, p. 34.

The Shirt, Waist and Laundry Workers and the United Garment Workers were also drawn into a dispute regarding the use of the label. In certain factories which made both overalls and shirts the Shirt, Waist and Laundry Workers organized the operatives, while in certain other factories of the same kind the United Garment Workers did the same. As a result both unions allowed their labels to be placed on shirts and overalls. The two organizations realized that some steps must be taken looking toward the settlement of the dispute, and in 1904 the following agreement was made:—

First. That all overall houses come under the jurisdiction of the United Garment Workers of America.

Second. That all shirt houses come under the jurisdiction of the Shirt, Waist and Laundry Workers' International Union.

Third. Should a house make overalls, pants, coats and shirts, the proportion of the product to decide the jurisdiction is as follows:

If fifty-one per cent or more of the product is overalls, the house comes under the jurisdiction of the United Garment Workers of America, or if fifty-one per cent or more of the product is shirts, the house comes under the jurisdiction of the Shirt, Waist and Laundry Workers' International Union.

Fourth. No United Garment Workers of America label shall be placed on shirts, or no Shirt, Waist and Laundry Workers' International union label shall appear on any overall.

Fifth. In granting labels to factories making overalls, coats, pants and shirts, the Executive Board of both organizations shall investigate and enforce the price-list, or the conditions as adopted by both organizations.

Sixth. Should a member of one organization secure temporary work in a composite shop under the jurisdiction of the other organization, their membership cards shall be recognized for a period of three months. If, however, a member remains in said factory over that time he shall then join the organization having jurisdiction over said factory, subject to the local by-laws in the city where such application is made.

Seventh. That the wage scale for operating as adopted for the Garment Workers be the minimum scale as a guidance for both organizations.

This agreement was never fully enforced on account of the disinclination of the San Francisco local union of Laundry Workers to force the workers in the shirt factories in that city to become members of the Shirt, Waist, and Laundry Workers' Union. In 1909 the Shirt, Waist and Laun-

dry Workers' International Union ceded jurisdiction over the workers on shirts to the Garment Workers' Union.¹

(b) In some industries several well defined trades of co-ordinate importance contribute to produce the article on which the label is placed. It would be possible for the union in each of these trades to have its own label, and the finished product might be marked by several labels. Such a plan would not yield the best results, however, since each union would be forced to attempt the creation of a demand for its own label. By combining their forces it has been thought that greater success would be obtained. The most important case of this kind has been the attempt made in the printing trade to form a combination of the various unions in support of a joint label which should serve to mark a product made entirely by unionists in the different trades concerned.

The first label in the printing industry was that of the International Typographical Union adopted in 1886. At that time, in addition to the printers, the pressmen and shortly thereafter the bookbinders were organized as local unions of the Typographical Union. The label was first issued independently to any local union whether composed of printers or of members of one of the allied trades. Each local union might issue the label to any employer who complied with its rules. As a result a piece of printed matter might bear the label although it was only partially the product of union labor. In 1893, when the label had become more important, the International union authorized the formation of allied printing trades' councils in those cities where unions of more than one of the printing trades were in existence. A new label known as the allied trades' label was adopted in addition to the Typographical Union label. The allied trades label was to be issued only through the councils. These councils were to be composed of delegates from the several local unions; they were largely voluntary, and in many cities were not formed because of friction among

¹Proceedings of the seventh annual convention of the Shirt, Waist and Laundry Workers Union, 1909, p. 80.

the local unions. In such cities each local union issued its own label.

In 1896 the Pressmen and Bookbinders were granted their independence, and an agreement was made by these unions with the International Typographical Union which covered among other things the issue of the label. Several differences soon appeared in the councils as to the conditions under which the label was to be issued, and in 1901 the agreement was abrogated. A new agreement was formed in 1904 among the Printers, the Pressmen, the Bookbinders, the Stereotypers and Electratypers and the Photo Engravers. The agreement was amended in 1907 and is still in force.

This agreement provides for a joint conference board composed of representatives from these unions as follows: four from the International Typographical Union, one from the International Printing Pressmen and Assistants' Union, one from the International Brotherhood of Book binders, one from the International Stereotypers and Electrotypers' Union, and one from the International Photo-engravers' Union. The officers of the joint conference board are a president, a vice president, a secretary-treasurer, and "such other officers as the Board may determine, but no two executive officers shall be chosen from one organization." The board hears appeals from the Local Allied Councils, and if the vote of the board concerning any question is a tie, the president of the joint conference board "may call another meeting for further consideration of the matter. If the case cannot be satisfactorily adjusted at such meeting a disinterested party shall be unanimously selected to act as arbitrator, and his decision shall be final."

The agreement provides for the formation of Allied Printing Trades Councils in localities where there are at least two organizations parties to the agreement. These local councils are composed of three representatives from each local union which is chartered by one of the parties to the agreement. No local union may have a vote in more than one Allied Council, irrespective of the jurisdiction

claimed. "Unions having jurisdiction over more than one city or town in which Allied Trades Councils exist shall have voice and vote in one Allied Council only, but may be represented, and shall have voice in the rest."

The Local Allied Councils are allowed to elect their own officers and to make such provisions and rules for their own government as do not conflict with the agreement or the laws of those unions which are parties to the agreement. The councils are the only bodies allowed to grant the use of the allied trades label in any jurisdiction. "All local unions of the national organizations parties to this agreement must withdraw their individual labels as soon as an Allied Council is formed."¹ The joint conference board,

¹ The complete text of the agreement is as follows:

1. The International Typographical Union shall procure and hold all Allied Printing Trades Council Union labels, and shall loan same to local allied printing trades councils as its agents, in accordance with the terms of this agreement, upon receipt of a sum of money from the local council not exceeding ten percent above the cost of production and distribution of said labels.

2. No Allied Printing Trades Council shall issue any label not procured from the International Union, nor any label differing in design from the label now known and registered as the Allied Printing Trades Council Union Label, nor duplicate nor allow the duplication of said label, except in case of stereotyped or electrotyped forms, in which case the label appearing in the plate or plates shall be destroyed immediately on completion of the work on which it is used.

3. No other body than the Local Allied Printing Trades Council shall be allowed to grant the use of the Allied Printing Trades Council Union Label in any jurisdiction. Provided, that the Joint Conference Board may order the issuance or withdrawal of the label, or issue said label direct, when in its judgment such action is necessary.

4. All labels must be procured by local councils from the Secretary-Treasurer of the International Typographical Union. Any infraction of this rule shall be deemed sufficient cause for the dissolution of the local union so offending.

5. Labels shall be loaned only with the unanimous consent of unions represented in the Allied Printing Trades Council. Unions objecting to the issuance of the label in any instance must produce a valid reason for such objection, the council to be the judge of the validity of such reason, subject to appeal to the joint conference board; provided, an active member in good standing of any branch represented in an Allied Printing Trades Council, who runs an office of not more than two platen presses, and in the operation of such office complies with the laws of his union, shall be permitted to use the label, provided the entire work of the office

however, reserves the right to issue or withdraw the label, or to issue the label direct, "where in its judgment such action is necessary." The International Typographical Union procures and holds all labels and loans them to the Allied Councils which act as its agents. No other label is valid unless procured from the International Typographical Union, and the unanimous consent of unions represented in the Allied Printing Trades Council is necessary before the label may be issued to any firm.

One of the chief difficulties in the working of this agreement has been the disinclination of many of the local unions, particularly of the Printers, to enter such councils. Until a council is formed the local union in any of the trades issues its label to such concerns as it sees fit. The board has unanimously decided that "an Allied Printing Trades Council must be formed, in accordance with the joint agreement, and the Allied label issued, where it can be conclusively shown that all interested Unions have an established wage scale and control seventy per cent. of the employes in their branch of the trade."

The chief cause of difference in the working of the agreement has been in connection with small printing offices. In a considerable number of such offices the proprietor works at the trade and is usually a printer. In addition to doing composition he attends to the one or two small presses in the office, and he may also perform the simpler operations of

be done by the proprietor thereof, and that when employment is given to any additional help members of affiliated unions must be employed. Violation of the foregoing shall be deemed sufficient reason for the immediate surrender of the label. The above provisions shall not apply in cities of five hundred thousand population or over.

6. In regard to label issuance, should any union chartered by a party to this agreement feel that an injustice had been done it, or should any local Allied Printing Trades Council feel that the action of any such union is detrimental to the best interests of the Council, an appeal may be taken to the Joint Conference Board under such provisions as may be adopted by such board.

7. Whenever an Allied Printing Trades Council is in existence, the local unions affiliated therewith shall withdraw the label of their respective unions, unless otherwise decided by the Joint Conference Board.

bookbinding, such as stitching. The Pressmen and Bookbinders have always objected to this practice as an invasion of their trades. They contend that their unions have jurisdiction over press work and bookbinding in all its branches. Various compromises have been resorted to in order to meet this difficulty.

In 1901, just before the abrogation of the Tripartite Agreement, it was agreed that in cities of under 500,000 population a pressman should be employed in all offices where there were more than two platen (flat bed) presses, otherwise the employer should not be allowed the use of the label. In cities of more than 500,000 population the local Trades Councils were to regulate the matter. In 1904, when the present agreement was formed, the following provision was made a part thereof: "in cities of less than 500,000 inhabitants a proprietor who runs an office of not more than two platen presses and in the operation of such an office complies with the laws of his union shall be permitted to use the label." It was also provided that whenever any additional help was employed, members of affiliated unions were to be employed. It was understood by the Printers, at the time of the adoption of this section, that a proprietor of such an office might serve as his own pressman notwithstanding any rules of the local pressmen's union. In 1908, however, the Pressmen contested this interpretation of this section, and the joint conference board struck out the provisions concerning small offices and the local Allied Trades Councils were given power to regulate the matter.

(c) Certain trades which are essentially subsidiary cannot have a label of their own. Such, for example, are the Stationary Engineers and Stationary Firemen. In industrial unions, as, for example, the Brewery Workers, such subsidiary trades, being organized as an integral part of the union, are represented by the label, but ordinarily the Engineers and Firemen are not considered in granting the label. The Shirt, Waist, and Laundry Workers have pursued, however, a peculiar policy in this respect.

In 1902 this union made an agreement with the Brotherhood of Stationary Firemen providing that "when any factory or laundry desires to use the label of the Shirt, Waist and Laundry Workers, the firemen must become members of the Brotherhood of Stationary Firemen. When the International Brotherhood of Stationary Firemen have no local, the firemen in the factory which is using the label of the Shirt, Waist and Laundry Workers shall become members of the Shirt, Waist and Laundry Workers Union; but when in any locality a local of the Brotherhood of Stationary Firemen is established, these firemen shall become members of that local without any extra expense, and when in any locality there are seven firemen, these seven firemen shall form a local of their own. The firemen shall not be allowed to do any laundry work and in case of any disagreement between either union and the employer, the other union will proffer its good offices to bring about a settlement of the dispute."¹

The agreement with the International Union of Steam Engineers made at the same time provided that "the engineers in any factory which desires to use the label of the Shirt, Waist and Laundry Workers must become members of the International Union of Steam Engineers; and should no local of the latter be within the jurisdiction of the situation of the factory, the engineers must become members of the nearest local union of that organization." As in the case of the firemen, the engineers were not allowed to do any part of the laundry work. Each union pledged itself to further the interests and aims of the other and to use its good offices for the settlement of all cases of dispute arising between the employer and the other union. The final article of the agreement provided that "all agreements between the Shirt, Waist and Laundry Workers and the International Union of Steam Engineers and the proprietors of the factory shall be made at the same time."²

¹ Proceedings of the Shirt, Waist and Laundry Workers, 1902, p. 37.

² Proceedings of the Shirt, Waist and Laundry Workers, 1903, p. 38.

CHAPTER VIII.

THE LEGAL PROTECTION OF THE LABEL.

It is obviously necessary, if the trade union label is to be an effective instrument, that the unions shall be able to prevent any other persons than those authorized by the union from using the label. The problem of protecting the label against counterfeiting does not appear to have much concerned the San Francisco and St. Louis cigar makers' unions. In both cases the label was registered with state officials; no question affecting the legal position of the label appears, however, to have arisen in either place.¹ For some years, however, counterfeiting of the label was so rare that it did not attract attention. About 1886 the Cigar Makers' Union experienced a great increase in the demand for the label, brought about by the rapid growth at that time in the strength of the trade-union movement. One result of this increasing demand was the appearance in several places of counterfeit Cigar Makers' labels. Since the Cigar Makers' Union was at this time the only union to which the use of the label was important, it carried on almost entirely the proceedings for the determination of the legal status of the label. The period during which this went on may be said to have extended from 1886 to 1889.

According to the English common law, any manufacturer or merchant who uses continuously a distinctive mark of authenticity through which his goods may be distinguished from those of others obtains a proprietary interest therein. This interest, it may be said, is not dependent upon the

¹ In 1879 the Cigar Makers' Association of the Pacific Coast made application for the registration of their label under the Act of Congress of July 8, 1870. Registration was refused on the ground that the label was not a trade mark within the purview of the act, since it did not appear that "the members of the Association all manufacture the same goods or propose to apply the mark to any particular kind." *Official Gazette*, February 1, 1879.

registration of the trade mark. The only advantage obtained by the St. Louis and San Francisco unions from registering their labels was to make proof of ownership easier. The legal remedy for infringement of the trade mark was exactly the same without registration as with it.

The question which the trade-union label brought before the courts, reduced to its simplest terms, was whether a body of organized workmen could obtain a proprietary interest in a label placed on goods made by them as a manufacturer or merchant could on goods owned and sold by him. The gist of the question was whether or not the obtaining of a proprietary interest in a trade mark was dependent on the possession of some proprietary interest in the goods on which the mark was placed. During the period under consideration the Cigar Makers attempted to establish in the courts the legal proposition that a group of laborers could under the common law obtain such an interest in a label.

The first important case to come before the courts was one in Baltimore. In November, 1886, Bernard Link was prosecuted by Cigar Makers' Union No. 1 of Baltimore for using a counterfeit label. It was held in the circuit court that he might be restrained by injunction. The chief point raised for the defendant was that the union did not have such a property interest in the label as to entitle it to the protection of the court. The court found, however, that the union did have such an interest. It was held in an ingenious argument that since the object and effect of the label was to increase the value of the labor of the members of the union, and since every workman had a property right in his own labor, they had also a property right in such instrumentalities as increased the demand for their labor. Since the label was, as the court found, such an instrumentality, a union might have an equitable property right in a label.¹

¹ The chief part of the opinion, as found in *Cigar Makers' Journal*, November, 1886, p. 7, is here reprinted:

"It is objected that the parties drawing the benefit of the label are not manufacturers, but employees or laborers, not owners of the article upon which the label is permitted to be affixed, but simply

The Link case was quickly followed by a more important case in New York, viz., *Bloete v. Simon* [19th Abb. N. Cas. (N. Y.) 88]. In this case an injunction was secured against Martin Simon, who was selling cigars packed in boxes bearing a counterfeit label. It was held in the lower New York

hired to make it. And it is, therefore, contended that they and their label are not within the established principles which govern courts of equity in the application of the law of trademarks and labels, heretofore exclusively applied, it is said, to the protection of the invested capital of manufacturers and merchants.

"Although the point thus raised is a novel and interesting one, but little difficulty should be found in disposing of it upon principle. The idea of property is necessarily a progressive one and is capable of development corresponding to the changes in the relations of men in a growing society. Distinct properties, says Puffendorf, were not settled at the same time, nor by one single act, but by successive degrees, nor in all places alike, but property was gradually introduced, according to either the condition of things, the number and genius of men required, or as it appeared requisite to the common peace.

"The bill claims that the object and effect of this label, as used by the plaintiffs and their associates, is to increase the value of their labor by increasing the demand for it as members of the union. That is the substance of what they claim, and at this stage of the case must be taken as true. It will not be denied that every freeman has a property right in his own labor, whether present or prospective. From this broad, general principle it is easy to develop the particular proposition, that an association of men who combine for the purpose of increasing, by legitimate means, the general demand for their common labor, have a property right in whatever lawful instrumentality they can succeed in creating and controlling for that purpose.

"To apply the test already mentioned, if such an instrumentality has a distinguishable existence, if it has an actual value to those claiming to be its owners, it is property. The fact that this label in this case is valuable to the plaintiffs and their associates is admitted by the demurrer. The defendant has sought to appropriate it, and by that act has demonstrated that the label is at all events worth stealing. It is true that it is not tangible property, like a trade mark, or a good-will, and as readily distinguishable. It is not the corporate property of a corporation, but the common property of a voluntary association, in which all its members have a common interest.

"A voluntary association can own property in a certain sense just as well as a partnership. [*Mears vs. Moulton*, 30 Md. 140]. Notwithstanding no precedent can be found among the reported cases in the highest courts of England, or this country, it seems sufficiently clear upon principle that the device of the label which the union has originated as its instrumentality for the purpose indicated and which the demurrer admits has effectually accomplished its object in increasing the value of their labor, it is a property right of the union in which all the members have a common interest."

court that such an injunction could be properly issued. The chief question in this case was whether one or more of the members might sue in behalf of all the members of the union. The court held that this might be done. This decision was rendered on April 13, 1887.

Both the Link case and the Simon case were decided in lower courts and were not appealed. The first case in which the question was brought before a court of final resort was a Minnesota case, *Allen v. McCarthy*, 37 Minn. 349, decided in December, 1887. The court divided evenly on the question as to whether an injunction might be issued against the counterfeiting of the Cigar Makers' label, and the judgment of the trial court, to the effect that such an injunction might be issued, was affirmed without opinion.

In December, 1887, the general term of the superior court of the State of New York affirmed a decision of the superior court of the City of New York granting an injunction against one Moonelis, who had counterfeited the Cigar Makers' label. The court held that "the plaintiff, being a member of the Cigar Makers International Union, had an interest in the proper use of the label which might, upon sufficient grounds, be protected by injunction against the inequitable use of those labels." The case was carried to the court of appeals, but went off on a question of practice. The court, however, took occasion to say: "A material fact bearing upon the right of the plaintiffs to final relief appears to be the force and effect to be ascribed to the allegation that the plaintiffs are cigar makers and whether that phrase impairs an ownership of the cigars thus made or permits the inference that they are never such owners. The implied allegation of ownership is controverted in the answer by a denial of any proprietary interest by the plaintiffs in the cigars thus made and an allegation that the pecuniary interests of the plaintiffs are not affected by the use or non-use of the labels in question. The issue thus made presents a serious question of law as to the right of the plaintiffs and we are not prepared to determine it in this preliminary proceedings and in the absence of findings

of fact showing the particular grounds upon which the judgment is based."¹

In 1888 the court of equity of New Jersey in the case of *Schneider v. Williams* [44 N. J. Eq. 391] held that a union could not acquire valid title to a trade mark since it had no property right in the cigars which were made by its members. This decision was followed in 56th N. J. Eq. 649, but the latter case was reversed in *Schmalz v. Wooley* [57 N. J. Eq., 303].

The Cigar Makers' Union by this time had become much impressed with the idea that a property right to the label could be shown if the suits for the protection of the label were undertaken by members of the union who were workmen and also owned their shops. In a New York case, which was tried in a lower court in July, 1888,² the suit was brought in the name of a member of the union who was also a manufacturer of cigars "employing nobody but himself." A conviction was secured under a New York law making it a criminal offense for a person to counterfeit trade marks, and the defendant was fined fifty dollars. This was the first case in which the union had secured a criminal conviction. At that time in only two states—New York and Pennsylvania—were there laws providing penalties for counterfeiting trade marks. The only remedy under the common law for violation of the property right in a trade mark is an injunction or a suit for damages. The suit for damages was rarely practicable since the counterfeiting concern was not usually responsible, and the injunction did not serve as a deterrent for future counterfeiters. Until the New York case, therefore, the remedy by injunction had been the sole defence against counterfeiting. The Cigar Makers' Union was much elated by the decision in New York, and still more gratified when the case was decided in its favor in the Supreme Court.³

¹ *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197, 11 N. Y. State, 270, 108 N. Y., 611. *Cigar Makers' Journal*, June, 1888, p. 9.

² *Cigar Makers' Journal*, August, 1888, p. 4.

³ *People v. Fisher*, 50 Hun (N. Y.), 552.

Almost simultaneously with the decision in the Fisher case came a decision of the supreme court of Minnesota.¹ The court held in this case, by a vote of three to two, that the union did not have a property right in the goods manufactured by its members of such a kind as to give it a right to a trade mark. The minority of the court, while agreeing that heretofore trade marks had been owned by persons who had a property interest in the goods on which the mark was placed, argued that the law might very well be adapted to cover the new state of affairs which had arisen.²

In 1889 the question of counterfeiting came conspicuously to the front. Advertisements, openly offering to supply manufacturers with counterfeit labels, appeared in a trade journal. Application was made to the circuit court of the United States for the Eastern District of Missouri for an injunction restraining Herman Ury, who, according to the allegation of the union, had been selling counterfeit labels under the name of B. Alberts. The court in this case decided that although the union label was not technically a trade mark, protection might be given it on the ground that the defendant was "perpetrating a fraud which injures the complainant's business and occasions him a pecuniary loss." The court differentiated the case before it from the Conhaim and Schneider cases by pointing out that in this case the complainant was "himself a manufacturer of cigars and according to the averments of the bill has built up a profitable trade by the use of the union label, which trade has been damaged, and is liable to be further damaged by the

¹ Cigar Makers' Protective Union v. Conhaim, 40 Minn. 243.

² They said: "The whole system of labor or trades unions is comparatively modern, and perhaps no case can be found in the books involving a similar state of facts. But it is one of the chief excellencies of the common law that its principles are capable of application to new conditions as they arise, and I think that it but needs a correct application of old principles to the new state of facts to protect the membership of this union in the benefits of their superior skill and experience as cigar makers, against the unfair competition of one who fraudulently imitates or counterfeits the label, adopted to distinguish their workmanship from that of others."

fraudulent acts of the defendants.”¹ The union attempted to secure a conviction of Ury on the ground of criminal conspiracy, but was unable to do so.²

In his address to the convention of 1889 President Strasser recommended that “all suits should be entered in the names of the officers of the union, and of at least one manufacturer who is a member of the union but does not employ hands. By taking this precaution of including at least one member who sells his own product, the Courts will protect the label of the Cigar Makers’ International Union.” In connection with this recommendation it was also advised that local unions should be required to admit small manufacturers to membership. Theretofore the constitution of the union had made it optional with local unions whether they should admit such applicants. It was hoped by this means to bring cases of label counterfeiting within the principle laid down in the case of *Carson v. Ury*.

But even if the courts in the various States had been uniformly willing to acquiesce in the view of the law, a difficulty presented itself, as has been noted, in the inadequacy of the injunction as a means of preventing counterfeiting. Accordingly, President Strasser recommended that in those states where it was possible the enactment of laws subjecting the counterfeiter and dealer to criminal prosecution should be secured.³ Such laws had within the year been passed in Minnesota, New Jersey, and New York. Since 1889 the union has devoted its efforts for protecting

¹ *Carson v. Ury*, 39 Fed. 777. It was held in *Hetterman v. Powers* [102 Ky., 133] that the right of members of the union in the label might be properly protected by an injunction even though the members were not manufacturers or sellers of cigars. Mr. W. A. Martin, in an article on “Union Labels” in the *American Law Review* for July-August, 1908, to which I wish here to make a general reference of indebtedness, defends the decision in *Hetterman v. Powers*. Mr. Martin supports his view by quotations from the *Link and Moonelis* case, but it seems clear that in both of these cases the arguments of the courts were directed to establishing the proposition that the label was a “technical trade mark.”

² Proceedings of the Eighteenth session of the Cigar Makers’ Union, 1889, p. 6.

³ Proceedings of the Eighteenth Session of the Cigar Makers’ International Union, 1889, p. 7.

the label to securing the enactment of similar laws in all the States rather than to attempting to establish the common-law right of a union to a trade mark. The following quotation from the report of the president of the Cigar Makers' Union for 1891 indicates the character of the efforts put forth in this direction and the difficulties encountered:

The progress made since the last convention, in placing laws upon the statute books of several States for the protection of the union label against counterfeiters and pirates, manifests an active spirit in the ranks of our local unions. It demonstrates the fact that, by taking proper steps in the right direction, legislation for the protection of our interests can be secured. Laws were passed by the legislatures of the following States: Massachusetts, Kentucky, Ohio, Kansas, Colorado, Nebraska, Indiana, Wisconsin, Illinois, Michigan and Maine.

Penal clauses providing for fines and imprisonment are incorporated in the laws of the following States: Massachusetts, Illinois, Michigan, Colorado, Indiana, Nebraska, Kansas and Wisconsin.

The laws passed by the legislatures of Massachusetts, Nebraska, Maine and Indiana should be amended:

In the law of Massachusetts the words "Whoever knowingly and wilfully forges and counterfeits" should be stricken out; it will be almost impossible to convict an offender while that remains part of the law.

Under the law of Nebraska, no violator can be convicted 'Unless he had been notified in writing by the owner thereof,' which practically means that the first offense is no crime and can not be punished.

The law of Maine is practically worthless, because it provides for a local label only. The label of the International Union can not be registered, unless the property right is assigned to a treasurer of a local union in that State.

The law of Indiana contains many weak points. It allows the sale of a trademark or label to other parties, and provides protection for citizens of that State only. It has no value for the International Union, which is composed of citizens of United States and Canada. The label is the property of the entire organization which cannot be assigned to a local union or to the local unions of a single State.

In the States of New York and Illinois, certificates of registration have been obtained in the name of the Cigar Makers' International Union of America. No local union should be permitted to apply for any other certificate.

It is absolutely necessary, for the better protection of the label, to secure laws providing for fine and imprisonment, in the States of Missouri and Pennsylvania, which seems to be the hot-bed of counterfeiters and pirates. I would therefore suggest that an appropriation be made sufficient to meet the necessary expenses.¹

¹ Proceedings of the Nineteenth Session, Cigar Makers' International Union, 1891. Cigar Makers' Official Journal, October, 1891, pp. 5-6.

In 1908 laws for the registration and protection of trade-union labels were in force in forty-one States and territories. These laws in general provide that any trade union may register its label on payment of a small fee with some designated state official, usually the secretary of state. Any person counterfeiting such a label is guilty of a misdemeanor. The punishment for the offense is usually a maximum fine varying from \$100 to \$500, or a maximum imprisonment varying from three months to one year. The minimum fine is not ordinarily fixed, but in a few states it is \$25; the minimum term of imprisonment also is not ordinarily fixed, but in a few States it is three months.¹

¹ Twenty-second Annual Report of the Commissioner of Labor, 1907.

INDEX

- Actors' Union, 30.
 Agreement in printing trades, 84-87.
 Alberts, B., 94.
 Allen v. McCarthy, 92.
 Allied Printing Trades Council, 21, 22, 35, 70, 83-87.
 Amalgamated Wood Workers' General Council, 28, 33, 41, 56.
 American Federation of Labor, 21, 22, 30, 31, 66, 67, 80.
 "Appeal to the Trade and Labor Unions of the United States and Canada," 16.
 Aurora, Ill., Cigar Makers' Union of, 61.
 Bakery and Confectionery Workers, 18, 24, 28, 33, 36.
 Barbers' Union, 30, 33, 42, 54, 55.
 Blend, Frederick, 14, 15.
 Bloete v. Simon, 91, 92.
 Boiler Makers and Iron Shipbuilders, 24.
 Bookbinders, International Brotherhood of, 83-87.
 Boot and Shoe Workers, 18, 27, 28, 34, 35, 47, 48, 52, 53, 64, 65, 68, 69, 72, 78.
 Brewery Workers' Union, 33, 73, 87.
 Brooks, J. G., 19.
 Broom and Whisk Makers, 33, 59, 72.
 Brush Makers, 41, 62, 72.
 Buttons, 23, 30, 43, 44.
 Can Makers' Mutual Protective Association, 18, 64.
 Carpenters' Eight Hour League of San Francisco, 10.
 Carriage and Wagon Workers' International Union, 27, 33, 41, 52.
 Carson v. Ury, 94, 95 note.
 Chinese in cigar industry, 9-12, 63.
 Cigar Makers' Association of the Pacific Coast, 10-12, 89 note.
 Cigar Makers' International Union of America, 14-17, 18, 19, 24, 25, 26, 28, 33-35, 37, 39, 41, 45-47, 49, 51, 55, 56 and note, 57-61, 63, 65, 67, 68, 70, 73, 76, 77, 78, 89; anecdote concerning color of label, 16 note.
 Cigar Makers' Protective Association v. Conhaim, 94 and note.
 Cloth Hat and Cap Makers' Union, 33, 41, 42.
 Commissioner of Labor, report, 75, 78 note, 97 note.
 Consumers' League, 66, 67.
 Coopers' International Union, 18, 28, 33, 52, 58, 59.
 Denver, Label League of, 66.
 Detroit, Cigar Makers' Union of, 15.
 Fehr, F. von der, 13 and note.
 Fur Workers' Union, 27, 33.
 Glass Bottle Blowers' Union, 24.
 Glove Workers' Union, 34, 40, 52, 62.
 Gompers, President, 67.
 Granite Cutters and Stone Masons, 24.
 Hat Finishers' Association, joint label with the Hat Makers' Association, 17.
 Hat Makers' Association, see Hat Finishers' Association.
 Hatters' Union, 18, 27, 33, 39, 40, 41, 52, 56, 58, 59, 62, 65, 67, 69, 70, 77, 78.
 Hetterman v. Powers, 95 note.
 Horseshoers' Union, 29, 30, 33.
 Hotel and Restaurant Employees' Union, 30, 33, 43, 62.
 International Printing Pressmen and Assistants' Union, 84-87.
 International Stereotypers' and Electrotypers' Union, 84-87.
 International Typographical Union, 33, 35, 41, 42, 47, 48, 57, 65, 66, 83-87.

- International Union of Steam Engineers, 30, 88.
 Iron Molders' Union of North America, 24, 25, 26.
 Jacksonville, Ill., Cigar Makers' Union in, 15.
 Jewelry Workers' Union, 65, 77.
 Joint Conference Board, 84, 85 note.
 Journeyman Horseshoers' Union, 41, 43.
 Journeyman Tailors' Union, 40, 79; agreement with Garment Workers, 79-80.
 Kearney, Denis, 12.
 Knights of Labor, 9, 17, 18, 19, 33.
 Label—origin, 9; introduction into cigar industry, 9-16; term "union label," 11 note; widespread use of, 19-22; of allied trades, 21; on product, 23-30; legend on, 24, 25; methods of attaching, 25-28; forms of, 28-30; universal design, 31; manufacturers' right to use of, 34-35; advertisement of, 45-49; infringement of, 49-50, 89-97; women and, 72; not a guarantee of quality, 76-77; extent of use, 77-78; disputes over use of, 79-83; of federated unions, 83-87; counterfeiting of, 89, 91, 93-97; legality of, 90-97.
 Label custodian, 35, 37.
 Label holder, 33.
 Label secretary, 36.
 Ladies' Garment Workers' Union, 33, 67, 72, 80, 81; label secretary of, 37.
 Leather Workers on Horse Goods, 42.
 Legends on labels, 24.
 Link, Bernard, 90.
 Link case, 90 and note, 92.
 Lynch, President, 66.
 Machinists' Union, 22.
 Manufacturers' right to use of label, 34, 35.
 Martin, W. A., 95 note.
 Meat Cutters and Butcher Workmen, 26, 30, 43, 65, 72.
 Metal Mechanics' Union, 22.
 Metal Polishers and Buffers, 20, 22.
 Molders and Stove Mounters, 18, 20, 74.
 Moonelis Case, see Strasser v. Moonelis.
 Musicians' Union, 20, 30; uniforms proposed, 30.
 Muther, Frank, 10.
 National Building Trades' Council, 22.
 National Print Cutters' Association of America, 28, 29, 49; "cutters," 28; "putters on," 29.
 56 N. J. Eq. 649, 93.
 One-man shop, 60-62, 95.
 Omaha, Union Label and Home Industry League of, 68; Western Laborer of, 68.
 Painters, Decorators, and Paperhangers, 33, 35, 43.
 Painters' Union, 33, 35.
 Paper Makers' Union, 25.
 People v. Fisher, 93, 94.
 Photo Engravers' Union, 84-87.
 Piano and Organ Workers, 33, 57, 59.
 Poles in hat industry, 17.
 Printers' Union, 27.
 Retail Clerks' International Protective Association, 20, 30, 33, 42, 62, 69.
 Rubber Workers' Union, 21, 26.
 St. Louis, Cigar Makers' Union of, 12-14, 89.
 San Francisco, Cigar Makers' Union in, 9, 63, 89; Laundry Workers in, 82; Carpenters' Eight Hour League of, 10.
 Schmalz v. Wooley, 93.
 Schneider v. Williams, 93.
 Sheet Metal Workers, 33, 38, 42, 49.
 Shirt, Waist, and Laundry Workers, 29, 30, 33, 34, 39, 41, 42, 47, 48, 80-83, 87, 88.
 Shop card, 23, 30, 42, 54.
 Shop stewards, etc., 38, 39.
 Simon, Martin, 91.
 Slavs in hat industry, 17.
 Stationary Firemen, 30, 87, 88.
 Stationary Engineers, 87.
 "Stickers," 66, 71.
 Store card, 62.
 Strasser, President, 15, 16, 61, 95.
 Strasser v. Moonelis, 92, 93.
 Tailors' Union, 18, 27.
 Teamsters' Union, 30.

- Terre Haute, Cigar Makers' Union in, 15.
Theatrical Stage Employees, 30.
Tobacco Workers, 31 note, 33, 37, 49.
Travellers' Goods and Leather Novelty Workers, 33, 43, 58, 59.
Tripartite Argeement, 84, 87.
Union Bar Label, 43.
Union House Card, 43.
Union Label and Home Industry League of Omaha, 68.
United Garment Workers of America, 27, 33, 35, 36, 38, 47, 57, 58, 63, 65, 79-83; agreement with Journeyman Tailors, 79, 80; label secretary of, 36, 37.
United Hatters of North America, 17, 34.
United Mine Workers, 24 note.
Upholsterers' International Union of North America, 20, 25, 28.
Ury, Herman, 94, 95.
Watch Case Engravers, 20, 21.
Western Laborer of Omaha, 68.
Women's Label League, 66, 72.
Women's International Union Label League, 66.

THE DOCTRINE OF NON-SUABILITY OF
THE STATE IN THE UNITED STATES

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and
Political Science

THE DOCTRINE OF NON-SUABILITY OF
THE STATE IN THE UNITED STATES

BY

KARL SINGEWALD, PH.D.

Fellow in Political Science John Hopkins University

BALTIMORE
THE JOHNS HOPKINS PRESS

1910

COPYRIGHT 1910 BY
THE JOHNS HOPKINS PRESS

PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

PREFACE.

This paper is a study of the questions of public law involved in the doctrine of immunity of the state from suit, and especially of the relation of this doctrine to suits against public officers. It does not include a consideration of the extent to which suits against themselves are allowed by the United States and by the several States, nor of the principles of law governing cases brought under such permission. The determination of the philosophical basis of the responsibility of the state, also, does not fall within the scope of this paper.

The study is based mainly on the cases decided by the supreme court of the United States, both because of the greater importance of those cases, and because the supreme court is the only tribunal before which has come any considerable number or variety of suits of this class. If the criticism of some of the decisions seems too free, I trust it will be pardoned; for it is not inconsistent with the most profound respect for the court.

For convenience, the use of the word state in the generic sense, and the use of the word State as applied to the States of the United States, will be distinguished by capitalizing the latter. Wherever the term supreme court is used without other designation, reference is had to the supreme court of the United States.

I gladly embrace this opportunity of expressing my grateful obligation to Professor Willoughby, head of the department of political science at the Johns Hopkins University. It is to his broad grasp and clear exposition of constitutional law that I owe my great interest in the subject.

K. S.

June, 1910.

TABLE OF CONTENTS.

PART I.

SUITS AGAINST THE STATE.

CHAP. I. THE GENERAL DOCTRINE.....	9
Its foundation.....	9
In international law.....	12
CHAP. II. THE DOCTRINE IN THE UNITED STATES. UNDER THE FEDERAL CONSTITUTION	15
CHAP. III. PRINCIPLES OF THE CONSTITUTION OF THE UNITED STATES GOVERNING SUITS AGAINST STATES.....	27
The eleventh amendment and suits between States.....	27
Consent of State and jurisdiction of federal courts.....	29
Restriction of consent to State courts.....	35
Withdrawal of consent and impairment of the obligation of contracts.....	36
CHAP. IV. SCOPE OF THE DOCTRINE OF NON-SUABILITY—FORMS OF ACTION.....	38
Actions that are suits against the state.....	38
Actions that are not suits against the state.....	42

PART II.

SUITS AGAINST PUBLIC OFFICERS.

CHAP. I. THE PRINCIPLE OF LIABILITY IN TORT.....	45
CHAP. II. INJUNCTION AGAINST TORT.....	47
CHAP. III. RECOVERY OF PROPERTY IN THE POSSESSION OF PUBLIC OFFICERS.....	54
CHAP. IV. MANDAMUS AND ANALOGOUS REMEDY IN EQUITY.	67
CHAP. V. EXTENSION OF THE PRINCIPLE OF EQUITABLE RE- LIEF AGAINST WRONGFUL ACTS.....	1
CHAP. VI. EX PARTE YOUNG.....	90
CHAP. VII. FEDERAL QUESTION—WHEN INVOLVED IN SUITS AGAINST STATE OFFICERS.....	105
CHAP. VIII. THE RELATION OF THE STATE TO SUITS AGAINST ITS OFFICERS.....	111

TABLE OF CASES.

- Adams, Ill. Cent. R. R. Co. v., 31, 115
Alabama, Postal Tel. Co. v., 17, 29, 33, 115
Alabama, So. & No. Ala. R. R. Co. v., 31, 36
Alexander, Buchanan v., 38
Alsbrook, R. R. Co. v., 110
Ames, Smyth v., 30, 91, 94 seq., 115
Antoni v. Greenhow, 36, 76, 78, 79
Arbuckle v. Blackburn, 108
Arkansas, Beers v., 31, 36, 44
Arkansas, Curran v., 31
Arkansas, Pres. & Dir. etc. v., 43
Atl. & N. C. R. R. Co., Christian v., 40, 59
Atl. Coast Line R. R. Co., Gunter v., 34, 41, 49, 89, 94, 101, 102
Atl. Coast Line R. R. Co., Prentiss v., 103
Avery, Humbird v., 85
Ayers, ex parte, 37, 77, 78, 81, 83, 87, 96 seq., 116
Bank of U. S. v. Planters' Bank of Ga., 42
Bank, Osborn v., 21, 47 seq., 54, 57, 60, 81, 83, 111, 117
Barnard, Clark v., 32
Barney v. New York, 95, 106 seq.
Barrow, Shield v., 40
Beers v. Arkansas, 31, 36, 44
Belknap v. Schild, 50 seq., 111, 117
Blackburn, Arbuckle v., 108
Board of Liq. v. McComb, 67, 69 seq., 88
Bouldin v. State, 44
Briggs v. Light-boats, 10, 38
Brown v. Hitchcock, 85
Brown v. Huger, 62
Bruce, Intern'l Postal Supply Co. v., 52
Buchanan v. Alexander, 38
Budd v. Houston, 86
Burke, State ex rel. Hart v., 74, 75
Burke, State ex rel. Newman v., 75
Carr v. U. S., 16, 44, 62, 64, 112
Carpenter, State B'd. of Land Com'rs. v., 84
Case v. Terrell, 40, 44
Chandler v. Dix, 36, 65, 89, 114
Cherokee Nation v. Ga., 17
Chisholm v. Ga., 15 seq.
Christian v. Atl. & N. C. R. R. Co., 40, 59
Civil Rights Cases, 108
Clark v. Barnard, 32
Clemson Agr. College, Hopkins v., 53
Cohens v. Va., 16, 21, 42
Colorado, Kansas v., 11
Cotting v. Godard, 94, 115
Crain, General Oil Co. v., 32, 108 seq.
Crittenden, Rolston v., 68, 76
Cunningham v. M. & B. R. R. Co., 40, 51, 57, 65, 68, 72, 79, 81, 112, 113
Curran v. Arkansas, 31
Dashiell v. Grosvenor, 52
Davis v. Gray, 77, 81, 82 seq., 112
Davis & F. Mfg. Co. v. Los Angeles, 94, 95, 100
Debs, In re, 41
De Groot v. U. S., 44
Dennison, Ky. v., 20
Dietzsch v. Huidekoper, 93
Dix, Chandler v., 36, 65, 89, 114
Dockery, Mo. v., 108
Dodge v. Woolsey, 49
Eckford's Ex'trs, U. S. v., 43
Ex parte Ayers, 37, 77, 78, 81, 83, 87, 96 seq., 116
Ex parte Virginia, 107
Ex parte Young, 24, 31, 52, 90 seq., 105, 116, 117
Fargo v. Hart, 87, 108

- Farmers' Loan & Trust Co.,
 Reagan v., 30, 41, 94 seq., 108
 Ferguson v. Ross, 42
 Fitts v. McGhee, 95, 96 seq., 103
 Florida v. Ga., 20, 25, 111
 General Oil Co. v. Crain, 32, 108
 seq.
 Georgia, Cherokee Nation v., 17
 Georgia, Chisholm v., 15 seq.
 Georgia, Fla. v., 20, 25
 Georgia v. Stanton, 82
 Georgia v. Tenn. Copper Co., 24
 Gibson, Weyler v., 65
 Godard, Cotting v., 94, 115
 Governor of Ga. v. Madrazo, 23,
 54, 112
 Gratiot v. U. S., 43
 Gray, Davis v., 77, 81, 82 seq.,
 112
 Grayson v. Va., 20
 Greenhow, Antoni v., 36, 76, 78,
 79
 Greenhow, Poindexter v., 22, 36,
 49, 54, 112
 Grisar v. McDowell, 62
 Grosvenor, Dashiell v., 52
 Gunter v. Atl. Coast Line R. R.
 Co., 34, 41, 49, 89, 94, 101, 102
 Guthrie, U. S. v., 73
 Hagood v. Southern, 51, 78, 80
 Hall v. Wisc., 31
 Hammond, Mich. State Bank v.,
 58, 65
 Hans v. La., 18, 22
 Hart, Fargo v., 87, 108
 Hill v. U. S., 44
 Hitchcock, Brown v., 85
 Hitchcock, Minn. v., 29, 41, 85,
 115
 Hitchcock, Neganab v., 87
 Hitchcock, Oregon v., 85
 Hollingsworth v. Va., 19
 Hopkins v. Clemson Agric. Col-
 lege, 53
 Houston, Budd v., 86
 Huger, Brown v., 62
 Huidekoper, Dietzsch v., 93
 Humbird v. Avery, 85
 Humphrey v. Pegues, 34, 41
 Hunter v. Wood, 101
 Illinois Central R. R. Co. v.
 Adams, 31, 115
 Illinois Central R. R. Co., Miss.
 R. R. Com'n v., 93
 Illinois, Missouri v., 11
 In re Debs, 41
 In re Tyler, 50, 87
 Intercolonial Railway, Mason v.,
 13
 International Postal Supply Co.
 v. Bruce, 52
 Jackson, Wilcox v., 61
 Johnson, Miss. v., 82
 Jumel, La. v., 37, 51, 57, 68, 69
 seq., 87, 112, 117
 Kansas v. Colorado, 11
 Kansas v. U. S., 26
 Kawanakoa v. Polybank, 10, 21
 Kentucky v. Dennison, 20
 Klein, U. S. v., 44
 Jackson, Wilcox v., 61
 Lee, U. S. v., 10, 22, 44, 51, 56,
 59 seq., 111, 112, 114, 117
 Lightboats, Briggs v., 10, 38
 Lord, Salem Flouring Mills Co.
 v., 53
 Los Angeles, D. & F. Mfg. Co.
 v., 94, 95, 100
 Louisiana, Hans v., 18, 22
 Louisiana v. Jumel, 37, 51, 57, 68,
 69 seq., 87, 112, 117
 Louisiana, N. H. v., 23, 27, 113
 Louisiana v. Steele, 80
 Louisiana v. Texas, 108
 Lowry v. Thompson, 59, 115
 McClung, Meigs v., 61
 McComb, Board of Liq. v., 67,
 69 seq., 88
 McConnaughy, Pennoyer v., 77,
 79, 84
 McDaniel, U. S. v., 43
 McDowell, Grisar v., 62
 McGahey v. Va., 50, 96
 McGhee, Fitts v., 95, 96 seq., 103
 McLemore, U. S. v., 43
 McNeill v. So. Pac. Ry. Co., 93
 Macon & B. R. R. Co., Cunning-
 ham v., 40, 51, 57, 65, 68, 72,
 79, 81, 112, 113
 Madrazo, Gov. of Ga. v., 23, 54,
 112
 Marye v. Parsons, 96
 Maryland, Van Stophorst v., 16
 Mason v. Intercolonial Ry., 13
 Massachusetts, R. I. v., 20
 Meigs v. McClung, 61

- Michigan Land & Lumber Co. v. Rust, 85
 Michigan State Bank v. Hammond, 58, 65
 Michigan, U. S. v., 25
 Minnesota v. Hitchcock, 29, 41, 85, 115
 Mississippi v. Johnson, 82
 Mississippi R. R. Com'n. v. Ill. Cent. R. R. Co., 93
 Missouri v. Dockery, 108
 Missouri v. Illinois, 11
 Missouri, K. & T. R. R. Co. v. Mo. R. R. & W. Com'n., 41
 Murray v. Wilson Distilling Co., 59
 Nathan v. Va., 38
 Neganab v. Hitchcock, 87
 New Hampshire v. La., 23, 27, 113
 New Jersey v. N. Y., 20
 New York, Barney v., 95, 106 seq.
 New York, N. J. v., 20
 New York, Oswald, Adm'r. v., 16
 Noble v. Union R. Logging R. Co., 86
 North Carolina, S. D. v., 24, 25, 26, 28
 North Carolina v. Temple, 22
 North Carolina, U. S. v., 25
 Oaks, Phelps v., 33, 35
 Oregon v. Hitchcock, 85
 Osborn v. Bank, 21, 47 seq., 54, 57, 60, 81, 83, 111, 117
 Oswald, Adm'r. v. N. Y., 16
 Parsons, Marye v., 96
 Pegues, Humphrey v., 34, 41
 Pelican Ins. Co., Wisc. v., 17, 20
 Pennoyer v. McConnaughy, 77, 79, 84
 Pennsylvania v. Wheeling Bridge Co., 20
 Peters, U. S. v., 55, 60
 Phelps v. Oaks, 33, 35
 Pitcock v. State, 68, 88
 Planters' B'k of Ga., B'k of U. S. v., 42
 Poindexter v. Greenhow, 22, 36, 49, 54, 112
 Polybank, Kawanakoa v., 10, 21
 Postal Tel. Co. v. Ala., 17, 29, 33, 115
 Prentis v. Atl. Coast Line R. R. Co., 103
 President & Dir'trs, etc. v. Ark., 43
 Preston v. Walsh, 84
 Prout v. Starr, 89, 90, 92, 115
 Railroad Com'n. v. T. & A. R. R. Co., 101
 Railroad Co. v. Alsbrook, 110
 Reagan v. Farmers' L. & T. Co., 30, 41, 94 seq., 108
 Reeside v. Walker, 43
 Reeves, Smith v., 23, 35, 40, 96
 Rhode Island v. Mass., 20
 Ringgold, U. S. v., 43
 Rives, Va. v., 107
 Rolston v. Crittenden, 68, 76
 Ross, Ferguson v., 42
 Rust, Mich. Land & Lumber Co. v., 85
 Salem Flouring Mills Co. v. Lord, 53
 Schild, Belknap v., 50 seq., 111, 117
 Schwalby, Stanley v., 16, 44, 65, 111
 Shield v. Barrow, 40
 Smith v. Reeves, 23, 35, 40, 96
 Smith, Warner Valley Stock Co. v., 89
 Smyth v. Ames, 30, 91, 94 seq., 115
 South and No. Ala. R. R. Co. v. Ala., 31, 36
 South Carolina v. U. S., 103
 South Carolina v. Wesley, 111
 South Dakota v. N. C., 24, 25, 26, 28
 Southern, Hagood v., 51, 78, 80
 Southern Pac. Ry. Co., McNeill v., 93
 Southern Ry. Co., State v., 101
 Stanley v. Schwalby, 16, 44, 65, 111
 Stanton, Ga. v., 82
 Starr, Prout v., 89, 90, 92, 115
 State Board of Land Com'rs. v. Carpenter, 84
 State, Bouldin v., 44
 State ex rel Hart v. Burke, 74, 75

- State ex rel Newman v. Burke, 75
 State, Pitcock v., 68, 88
 State v. Southern Ry. Co., 101
 Steamship Scotia, Young v., 13, 39
 Steele, La. v., 80
 Tampa & A. R. R. Co., R. R. Com'n. v., 101
 Temple, N. C. v., 22
 Tennessee Copper Co., Ga. v., 24
 Tennessee, M. & C. R. R. Co. v., 31, 36
 Terrell, Case v., 40, 44
 Texas, La. v., 108
 Texas, U. S. v., 23, 25
 The Charkieh, 12
 The Davis, 12, 38, 42, 62
 The Exchange, 12, 60
 The Fidelity, 13
 The Jassy, 13
 The Parlement Belge, 11, 13
 The Siren, 11, 43
 The St. Jago de Cuba, 43
 Thompson, Lowry v., 59, 115
 Tindal v. Wesley, 65
 Trapnall, Woodruff v., 69
 Tyler, In re, 50, 87
 Union R. Logging R. R. Co., Noble v., 86
 United States, Carr v., 16, 44, 62, 64, 112
 United States, De Groot v., 44
 United States v. Eckford's Ext'rs, 43
 United States, Gratiot v., 43
 United States v. Guthrie, 73
 United States, Hill v., 44
 United States, Kansas v., 26
 United States v. Klein, 44
 United States v. Lee, 10, 22, 44, 51, 56, 59 seq., 111, 112, 114, 117
 United States v. McDaniel, 43
 United States v. McLemore, 43
 United States v. Mich., 25
 United States v. N. C., 25
 United States v. Peters, 55, 60
 United States v. Ringgold, 43
 United States, S. C. v., 103
 United States v. Texas, 23, 25
 United States v. Wilder, 13, 38, 42
 Van Stophorst v. Md., 16
 Virginia, Cohens v., 16, 21, 42
 Virginia, Ex parte, 107
 Virginia, Grayson v., 20
 Virginia, Hollingsworth v., 19
 Virginia, McGahey v., 50, 96
 Virginia, Nathan v., 38
 Virginia v. Rives, 107
 Walker, Reeside v., 43
 Walsh, Preston v., 84
 Warner Valley Stock Co. v. Smith, 89
 Wesley, S. C. v., 111
 Wesley, Tindal v., 65
 Weyler v. Gibson, 65
 Wheeling Bridge Co., Pa. v., 20
 Wilcox v. Jackson, 61
 Wilder, U. S. v., 13, 38, 42
 Wilson Distilling Co., Murray v., 59
 Wisconsin, Hall v., 31
 Wisconsin v. Pelican Ins. Co., 17, 20
 Wood, Hunter v., 101
 Woodruff v. Trapnall, 69
 Woolsey, Dodge v., 49
 Young, Ex parte, 24, 31, 52, 90 seq., 105, 116, 117
 Young v. S. S. Scotia, 13, 39

PART I.

SUITS AGAINST THE STATE.

CHAPTER I.

THE GENERAL DOCTRINE.

Its foundation.

The doctrine that the sovereign power may not be sued without its consent came to the United States as a part of the English law. In Continental jurisprudence it has a more limited scope than in English law. Ultimately, the doctrine goes back to the Roman law.

In England, at the time of the institution of royal courts, it would have been a strange proceeding for judges, acting for the king as his personal agents, to have attempted to hale him into court against his will. The principle of Roman law that "the will of the prince is law," though never adopted in England, influenced the judges to some extent, and served to give color to the immunity of the king. Later, the position of the courts became established, absolutism was definitely negated by the rise of constitutional monarchy, and the king in his public capacity became differentiated from the king in his private capacity. The reason stated above then no longer applied to suits against him in his private character; and his immunity in this respect is simply a historical persistence.¹ The same reason continued, on the other hand, for the immunity of the crown as the personification of the English state. It

¹ For a tendency, however, to accord a similar immunity to the president of the United States, as a matter of public policy in the case of the chief executive, see Goodnow: *Admin. Law of the U. S.*, pp. 91, 435.

is the ground upon which Justice Miller rested the doctrine of the non-suability of the state: "It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself in those courts."¹ And it is this ground, namely, that a court, the agent of the state, cannot subject its creator to its jurisdiction, that is here adopted as the most obvious and sensible explanation.

Acceptance of this foundation of the doctrine does not prevent the recognition of other reasons in justification. The courts commonly dwell upon the public policy and practical utility of the exemption. Justice Gray expressed this view admirably: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury."²

Another view of the exemption, resting upon the eminent authority of Justice Holmes, is this: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."³ This afforded a basis for the extension of the exemption to the territory of Hawaii: "As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which

¹ *U. S. v. Lee*, 106 U. S. 196.

² *Briggs v. Light-boats*, 11 Allen 157, 162.

³ *Kawanaoka v. Polybank*, 205 U. S. 349.

persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course, it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow."

Now, this view of Justice Holmes was not necessary to the decision. The reason of public policy might well have been held to extend to a government exercising such broad powers as the territory of Hawaii. Or, the view might have been taken—which I think is the proper view of all local governments—that a territory stands, for its purposes, simply in the stead of the superior government, and is therefore entitled to the same immunity from suit, an immunity which the territory, not being made a mere municipal corporation, has not lost. Nor do I think that the view of Justice Holmes is sound. His statement that "a suit presupposes that the defendants are subject to the law invoked" is contrary to the position towards which he inclined in *Missouri v. Illinois*,¹ and which Justice Brewer adopted in *Kansas v. Colorado*,² that, in the main, there is no law governing the States in relation to each other, and that the supreme court must build up what Justice Brewer called an "interstate common law." Law is necessary for jurisdiction; but, having jurisdiction, it is the function of a court to administer justice, according to law if any law is applicable, but to administer justice at all events. If no law is applicable, the court should, in the language of Justice Holmes, "be governed by rules explicitly or implicitly recognized" in the relations of the parties. The state, in its relations to individuals, may be considered as acting with reference to the ordinary principles of law. Certain it is that the courts are constantly applying to cases between the state and individuals, with certain modifications, the ordinary principles of law. And this is true, not only in the matter of contracts, but even in such cases as "*The Siren*"³

¹ 200 U. S. 496.

² 206 U. S. 46.

³ 7 Wall. 152.

and "The Davis,"¹ in which maritime liens were held to attach to property of the United States just as to property of individuals.

In international law.

The discussion thus far has related to the immunity of the state from suit in its own courts. The immunity in the courts of another state must, of course, rest upon a different basis. It is founded upon the international comity according to which, in the language of Chief Justice Marshall, "all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers,"² in favor of other sovereigns.

The extent of the exemption depends upon the point of view. Sir Robert Phillimore, in the case of "The Char-keh,"³ stated the principle to be that the sovereign "is personally exempt from all process in a civil cause, and from any action which renders such service necessary." An admiralty proceeding in rem does not require such service. The exemption of property of a foreign sovereign from such an action he rested, therefore, not upon the immunity from suit, but separately upon the same "object of international law" as sustains the personal immunity from suit—"to substitute negotiations between governments . . . for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state." He limited the exemption, accordingly, to cases where the res "can in any fair sense be said to be connected with the *jus coronæ* of the sovereign"; though he doubted but what, even in the case of a public war vessel, a proceeding in rem might be maintained where a maritime lien is given by the *jus gentium*. A similar view—that certain classes of property devoted to religious or public purposes are exempt from liens, but that where such a lien exists it may be en-

¹ 10 Wall. 15.

² "The Exchange," 7 Cranch 116.

42 L. J. Adm. 17.

forced in rem—is indicated in the opinion of Justice Story in *U. S. v. Wilder*.¹ Chief Justice Waite, also, in “*The Fidelity*,”² took the view that the exemption of public vessels from admiralty suits in rem arises not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. All of these expressions, it may be said, are purely obiter.

The position of Sir Robert Phillimore was repudiated by the court of appeals in “*The Parlement Belge*,”³ reversing his decision refusing exemption to a vessel, the public property of Belgium, used for the mails, and incidentally engaged in ordinary carrying trade. The court criticized his “intimation of an opinion, not yet conclusively formed, that proceedings in rem are a legal procedure solely against property, and not directly or indirectly against the owner of the property”; and regarded a libel in rem as an indirect way of impleading the owner, the result of admiralty necessity. “To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests.” The same view of a libel in rem was taken by the judicial committee of the privy council in *Young v. S. S. Scotia*,⁴ in which it was held that a lien for salvage could not be enforced against a ferry-boat, the property of the crown, destined for service in the operation of a government railway in Canada. “Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner.” In “*The Jassy*,”⁵ a vessel owned under similar conditions by the Roumanian government was held exempt. In *Mason v. Intercolonial Railway of Canada*,⁶ the supreme court of Massachusetts

¹ 3 Sumner 308.

² 16 Blatchf. 569.

³ 5 Prob. Div. 197.

⁴ 89 L. T. 374.

⁵ 75 L. J. (N.S.) P.D & Adm. Div. 93.

⁶ 197 Mass. 349.

dismissed for want of jurisdiction a suit by trustee process for a tort against the Intercolonial Railway, unincorporated, the property of the crown.

The better view, then, of the principle governing the immunity of a state from suit in the courts of another state, is that no state will subject another state to its territorial jurisdiction; so that the immunity extends, not only to actions requiring personal process, but also to actions in rem against the property of the state.

CHAPTER II.

THE DOCTRINE IN THE UNITED STATES. UNDER THE FEDERAL CONSTITUTION.

In *Chisholm v. Georgia*,¹ some doubt was expressed as to the applicability of the doctrine of non-suability of the state to a republic. Justice Wilson limited the doctrine to autocratic sovereigns. In the United States, according to his view, the people are sovereign; they have not delegated all their powers to the State governments; hence these governments—or, regarded as artificial persons, the States—are not sovereign in this sense. This reasoning applies as much to the United States as to a State; though Justice Wilson did not expressly say that the United States is liable to suit. Doubtless, he would have found some ground of distinction. Chief Justice Jay adopted a somewhat different line of reasoning. Immunity from suit, he said, naturally attached to a feudal sovereign as the sole fountain of justice; but where the citizens are equal and are joint tenants of the sovereignty, there is no reason why one citizen may not sue the rest. He saw no more difficulty in a suit against the fifty thousand citizens of Delaware, than against the forty thousand of the city of Philadelphia. The liability of the United States to suit he doubted simply on the practical ground that the courts of the United States could not rely on the executive arm of the government in such case to support their proceedings and judgments.

Manifestly, these views are based on false political theories. And the doctrine of non-suability of the state was early established in American law. It was accepted by all in the discussions in convention over the clause in the constitution extending the judicial power of the United

¹ 2 Dall. 419.

States to "controversies between a State and the citizens of another State." It was no doubt clinched by the storm of protest raised by *Chisholm v. Georgia*. No State court has seriously questioned it. And in *Cohens v. Virginia*,¹ in which, according to Justice Miller, the general doctrine was first recognized by the supreme court, it was taken for granted.

A different question is whether, in our federal system, the United States and the States, respectively, are entitled to immunity from the jurisdiction of the courts of the other. The State courts have never denied the immunity of the United States. And, as might be expected, the supreme court will enforce this immunity, as in *Stanley v. Schwalby*,² by reversing the action of a State court.³ This action is abundantly justified on the ground of the supremacy of the federal government, or of an implied principle of our federal system, as in the matter of exemption of federal and State governmental agencies, respectively, from taxation by the other.

The question of the liability of a State to suit in a court of the United States arose upon a construction of the provision of article III of the constitution, that "The judicial power of the United States shall extend . . . to controversies . . . between a State and citizens of another State." In August term, 1791, Alexander Chisholm, a citizen of South Carolina, brought action of assumpsit in the supreme court against the State of Georgia.⁴ On July 11, 1792, the marshal for the district of Georgia made return of service on the governor and attorney general of Georgia. On August 11, Attorney General Randolph, counsel for plaintiff, moved: "That unless the State of Georgia shall, after reasonable previous notice of this motion, cause an appearance

¹ 6 Wheat. 382.

² 162 U. S. 255. In this case, the Texas court considered that the United States had waived its immunity. The supreme court held contra.

³ See also *Carr v. U. S.*, 98 U. S. 433.

⁴ 2 Dallas 419. Similar cases brought about the same time—*Van Stophorst v. Md.*, 2 Dall. 401, *Oswald Admr. v. State of N. Y.*, 2 Dall. 401, 2 Dall. 415.

to be entered in behalf of the said State, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages be awarded." But, to avoid every appearance of precipitancy, and to give the State time to deliberate on the measures she ought to adopt, on motion of Mr. Randolph it was ordered by the court that the consideration of the motion be postponed to the next term. Messrs. Ingersoll and Dallas presented a written remonstrance and petition on behalf of Georgia against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in argument. The case was submitted on February 5, 1793, on the argument of Mr. Randolph alone. On February 18, the decision of the court was handed down on the great question whether a State might be involuntarily impleaded in a federal court. Four justices—John Jay, Chief Justice, of New York; John Blair, of Virginia; William Cushing, of Massachusetts; and James Wilson, of Pennsylvania—joined to hold the State liable. James Iredell, of North Carolina, alone dissented.

The main stand of the majority was upon the letter of the constitution. As Mr. Randolph argued, conceding, as he did, the sovereignty of the States, if the constitution provided for jurisdiction over them by the federal courts, that was simply one of many diminutions of sovereignty. On the other hand, the provision might be construed in the light of established principles, as the grant of judicial power has been construed in other respects.¹ The courts of the United States are courts of limited jurisdiction; and, if the judicial power had not been extended to cases in which a State should be a party, no jurisdiction could have been entertained in such cases even with the consent of the State.² The provision covering such cases might well be construed as conferring jurisdiction subject to the established doctrine

¹ *Cherokee Nation v. Georgia*, 5 Pet. 1. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

² *Postal Tel. Co. v. Alabama*, 155 U. S. 482.

that a state cannot be sued without its consent. Justice Iredell was strongly of opinion that the constitution was to be construed "as intending merely a transfer of jurisdiction from one tribunal to another." And this view was adopted by Justice Bradley, speaking for the court in *Hans v. Louisiana*.¹ "The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. . . . The suability of a state without its consent was a thing unknown to the law."

Which construction was proper should have been determined upon two considerations: the spirit of the constitution, and the intention of those who adopted it. Justice Wilson and Attorney General Randolph, the master minds on their side, were strongly convinced of the necessity of allowing suits against the States in the courts of the United States on federal grounds—the maintenance of harmony, and the enforcement of constitutional limitations.² Naturally, with such political views, they held that the spirit of the constitution demanded a literal construction. Justice Iredell differed even upon the question of policy. The other consideration, the actual intention upon the particular point of those who adopted the constitution, was completely ignored. In the main, the provision seems to have been overlooked in the State conventions. But where its significance was appreciated, it was made the subject of violent attacks by the opponents of the constitution, attacks that were successfully met only by the solemn assurances of its friends—Hamilton, Madison, Marshall—that such an unheard of thing as a suit by an individual against a State was never contemplated. Certainly, it may be taken for granted

¹ 134 U. S. 1.

² Randolph had expressed similar views in the Virginia convention. Wilson was probably responsible for the provision in question.

For a collection of the historical facts upon the provision of the judiciary article, upon *Chisholm v. Ga.*, and upon the adoption of the 11th amendment, see "The Eleventh Amendment", an address before the Virginia State Bar Assn., July 30, 1907, by A. Caperton Braxton.

that the constitution could never have been adopted if it had been understood to contain the doctrine of *Chisholm v. Georgia*. The action of the court was regarded as the imposition of personal political views. It was met by a storm of protest throughout the country, and the reversal of the action by the eleventh amendment.¹

Justice Iredell, although expressing an opinion strongly against a literal construction of the constitution, restricted his decision to a narrower ground. He took the position that the constitutional grant of judicial power required legislation by congress to put it into effect; and that "whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption; yet it is certain that the legislature has in fact proceeded upon the former supposition, and not upon the latter." The judiciary act conferred upon the courts of the United States the power to issue certain specified writs, and such other writs as should be necessary to the exercise of their jurisdiction, "agreeable to the principles and usages of law." But, Justice Iredell reasoned, this did not confer power to issue a writ against a State, because there was no mode applicable of proceeding against a State "agreeable to the principles and usages of law." None of the States made provision for such proceedings at the time of the judiciary act, even if such provision would have availed in this case. The only other possible source was the English law; and in a learned exposition of petition of right and of process in exchequer, Justice Iredell showed that these remedies against the crown were of an entirely different nature than the action in hand.

¹ In February term, 1794, judgment was entered for the plaintiff in *Chisholm v. Georgia*, and the writ of enquiry awarded. The writ, however, was never sued out and executed; so that the cause, with all similar causes, was swept from the records by the eleventh amendment, agreeably to the unanimous determination of the judges in *Hollingsworth v. Va.*, February term, 1798.

This reasoning, it seems to me, is faulty. It would limit, in cases where a State is suable as of right, to forms of action where the state is not suable as of right. If a State is suable as of right, the ordinary forms of action ought to lie. Thus, Attorney General Randolph took it for granted that, if a State is liable to suit, assumpsit would lie. The majority justices did not discuss the question upon which Justice Iredell based his decision, except as to the matter upon whom service on the State should be served, upon which they agreed that the service in the case in hand was sufficient. Certainly, the supreme court has always held itself fully equipped, as to process, service, course upon failure to appear, judgment, to exercise its original jurisdiction in cases in which a State is a party.¹

If the view be adopted that the constitutional provision extending the judicial power to suits between a State and the citizens of another State is to be construed in the light of established principles, the question remains whether the position of the States in the Union is such as to entitle them to the principle of exemption in a court of the United States. This question was not satisfactorily discussed in *Chisholm v. Georgia*. As already stated, those of the majority, in the main, whether accepting the sovereignty of the States or expressing no opinion thereupon, relied on the words of the constitution. Justice Wilson himself justified his grandiloquent pronouncement that "the question . . . may, perhaps, be ultimately resolved into one no less radical than this—do the people of the United States form a nation?" by no real exposition of the position of a State in the Union. The theory of divided sovereignty accepted at the time of *Chisholm v. Georgia* would clearly sustain the exemption. Whether, accepting the present doctrine of the

¹ For rules of court governing cases in which a State is defendant, see *Grayson v. Va.*, 3 Dall. 320.

For varying opinions as to whether the power to exercise the original jurisdiction conferred by the constitution is inherent in the supreme court, or whether it is derived from act of congress, see *N. J. v. N. Y.*, 5 Pet. 284; *R. I. v. Mass.*, 12 Pet. 657; *Pa. v. Wheeling*, etc. *Bridge Co.*, 13 How. 518; *Fla. v. Ga.*, 17 How. 478; *Ky. v. Dennison*, 24 How. 66. Also *Wisc. v. Pelican Ins. Co.*, 127 U. S. 265.

unity of sovereignty in the United States, the exemption of a State may be supported upon an implied principle of our federal system of government, may be debated, in view of other federal reasons in favor of liability. Looking at the matter entirely apart from the constitutional provision, a State would, of course, be entitled to exemption upon the extension of the principle, as in *Kawanakoa v. Polybank*,¹ to any government that exercises general legislative powers. Whether, however, a principle of exemption based upon anything less than actual sovereignty should control the words of the constitution, seems doubtful.

From the above discussion, it will be seen that the court had a difficult case in *Chisholm v. Georgia*. The decision, whether right or wrong, that a State might be subjected to suit by a citizen of another State, was, however, overturned, and the question finally settled by the eleventh amendment, providing that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."

Evidently, the idea never occurred to anyone at the time of the adoption of the eleventh amendment that a suit might be brought in a court of the United States against a State by its own citizen, under the grant of judicial power over "all cases in law and equity arising under the constitution or laws of the United States." And, from the time of the eleventh amendment, it was generally recognized that no individual could subject a State to suit. It is true that, in *Cohens v. Virginia*,² Chief Justice Marshall used language that seemed to indicate that the exemption did not extend to suits against a State by its own citizens; but this suggestion, which was later the main reliance of plaintiff in *Hans v. Louisiana*, was entirely unnecessary to the case. In *Osborn v. Bank*,³ although the bank was a corporation of

¹ 205 U. S. 349.

² 6 Wheat. 264.

³ 9 Wheat. 738.

the United States, and therefore not within the terms of the eleventh amendment, the chief justice discussed the case upon the basis of the non-suability of the State. In *United States v. Lee*,¹ Justice Miller said: "It is obvious that, in our system of jurisprudence, the principle is as applicable to each of the States as it is to the United States." And Justice Gray declared in the same case: "The decision in *Chisholm v. Georgia* was based on a construction of the words of the constitution. . . . That construction was set aside by the eleventh amendment." In *Poindexter v. Greenhow*,² the court discussed all the cases upon the basis of non-suability of a State, although in the title case the parties were both citizens of Virginia. And in his dissenting opinion, concurred in by three other justices, Justice Bradley expressly took the ground that, although the eleventh amendment does not apply to suits against a State by its own citizens, it would be absurd to maintain such liability.

In *Hans v. Louisiana*,³ the question came squarely before the supreme court, on appeal from a decision of the United States circuit court, dismissing a suit brought, on a federal ground, by a citizen of Louisiana against the State of Louisiana.⁴ The court unanimously affirmed the decision below. Justice Bradley, speaking for the court, said: "Adhering to the mere letter, it might be so; and so, in fact, the court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided." That the principle of immunity applied to the States, he seems not to have doubted; and the eleventh amendment he regarded as having established a rule of construction for one clause that ought to be applied also to other similar clauses.

¹ 106 U. S. 196.

² 114 U. S. 270.

³ 134 U. S. 1.

⁴ Reaffirmed in *North Carolina v. Temple*, 134 U. S. 22.

Justice Harlan expressed his disapproval of the criticism of *Chisholm v. Georgia*. His opinion, it seems, however, was simply that literal construction was proper at that time, and not that the principle of immunity does not naturally apply to the States; for in *United States v. Texas*,¹ he said of *Hans v. Louisiana*: "That case, and others in this court relating to the suability of States, proceeded upon the broad ground that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." It may be said that the decision in *Chisholm v. Georgia*, in favor of literal construction of the constitution as it then stood, seems, also, to be approved by Chief Justice Marshall in *Cohens v. Virginia*, in marked inconsistency with his assurances in the Virginia convention. In *New Hampshire v. Louisiana*,² Chief Justice Waite used the fact that a direct remedy was given by the original constitution to citizens of one State against another State, as an argument against allowing the indirect remedy through the action of their State in their behalf.

In *Smith v. Reeves*,³ the principle of *Hans v. Louisiana* was applied to exclude from the general right of a corporation of the United States to bring suits in the courts of the United States, suits against a State. In *Governor of Georgia v. Madrazo*,⁴ Justice Johnson, dissenting, held, and Chief Justice Marshall noticed the objection without ruling upon it, that the eleventh amendment applies only to suits in law and equity, and that the immunity of a State does not extend to suits in admiralty. In view of the subsequent attitude of the court, in favor of the immunity of a State from all suits by individuals, this view may be regarded as wrong.

Some expressions in other cases seem to indicate a view that the exclusion of all suits by individuals against States was accomplished by the eleventh amendment, not by reversing a rule of construction so as to secure to the States their proper exemption, but directly by awarding such an

¹ 143 U. S. 621.

² 108 U. S. 76.

³ 178 U. S. 436.

⁴ 1 Pet. 110.

exemption. Thus, in *South Dakota v. North Carolina*,¹ Justice Brewer, speaking for the majority, said: "We are not unmindful of the fact that in *Hans v. Louisiana* . . . Mr. Justice Bradley . . . expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm v. Georgia*; but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the eleventh amendment according to its spirit rather than by the letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State." And in the dissenting opinion of the four justices in the same case, Justice White said of the decision in *Hans v. Louisiana*: "It held that the effect of the eleventh amendment was to qualify, to the extent of its prohibitions, the whole grant of judicial power; and, therefore, although a suit by a citizen of a State against a State, to enforce assumed constitutional rights, was not within the letter of the amendment, it was within its spirit." Justice Peckham, also, in delivering the opinion of the court in *Ex parte Young*, said, in conceding that the eleventh amendment must be given its full and fair meaning: "It applies to a suit brought against a State by one of its own citizens, as well as to a suit brought by a citizen of another State. *Hans v. Louisiana*."²

In the main, however, the court has recognized the immunity from suits by individuals as a natural attribute of the States. As Justice Miller said, in *United States v. Lee*: "It is obvious that, in our system of jurisprudence, the principle is as applicable to each of the States as it is to the United States." Certainly, the States, though not sovereign in political theory, have in general been accorded the attributes of sovereignty, as—to use a term of Justice Holmes³—quasi-sovereign.

The constitution also provides that the judicial power of the United States shall extend to controversies between two

¹ 192 U. S. 286.

² 209 U. S. 123.

³ *Ga. v. Tenn. Copper Co.*, 206 U. S. 230.

or more States. The undoubted intent here would demand in any view that this provision should be held not to require the consent of a State sued.

The jurisdiction over "controversies between a State . . . and foreign states," also conferred by the constitution, the court has never been called upon to exercise; but, in view of the fact that the eleventh amendment left unchanged this part of the clause in the constitution, it may be assumed that this provision would likewise be held not to require the consent of a State sued.

A question not quite so simple was whether a State could be subjected to suit by the United States. Justice Peckham, in *United States v. Michigan*,¹ seemed to consider that such a suit might be entertained as "between States." So, also, Justice White, in *South Dakota v. North Carolina*.² But this view appears ill-founded. The jurisdiction must be sustained upon the clause extending the judicial power to "controversies to which the United States shall be a party."

In *Florida v. Georgia*,³ Justices Campbell, Curtis, and McLean, dissenting, held that the United States could not sue a State; that "the constitution did not enlarge the liability of States to suits, but only provided tribunals to which suits might be brought to which they were already subject." Chief Justice Taney, speaking for the court, touched upon the question merely in arguing that if the United States could not become a party, there was all the more reason for allowing the attorney general to argue in behalf of the United States without making the United States a party. In *United States v. North Carolina*,⁴ the supreme court decided a case brought by the United States against North Carolina, the State making no objection.

In *United States v. Texas*,⁵ objection was made, and the question came squarely before the court for decision. Juris-

¹ 190 U. S. 379.

² 192 U. S. 286.

³ 17 How. 478.

⁴ 136 U. S. 211.

⁵ 143 U. S. 621.

diction was upheld. Justice Harlan, delivering the opinion of the court, considered that, although "it is inherent in the nature of sovereignty not to be amenable to suit by an individual without its consent," "the question as to the suability of one government by another government rests upon wholly different grounds." This is, I think, an incorrect statement of the principle of non-suability of the State. The principle is not simply that sovereignty may not be sued by an individual, but that sovereignty is not subject to the jurisdiction of courts. The ruling in the case is abundantly justified, however, by weighty federal reasons, and by the fact that the States are subject to suit by one another.

The converse of this case—a suit by a State against the United States—has also arisen. The view of Justice Harlan that the principle of non-suability does not apply to suits by one government against another government would, of course, logically support such a case. Justice White, in *South Dakota v. North Carolina*,¹ argued upon the assumption that such a suit may be maintained. In *Kansas v. United States*,² however, the supreme court, without dissent, dismissed the case for want of jurisdiction, on two grounds: first, that the State had no substantial interest, and was simply acting for individuals; second, that a State may not sue the United States without its consent. Chief Justice Fuller, delivering the opinion of the court, said: "It does not follow that because a State may be sued without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids this conclusion." This holding was unnecessary to the decision, and, therefore, to some extent extra-judicial. Yet it is, no doubt, to be accepted as final. It may, perhaps, be justified upon the ground that the reasons for allowing such suits are less urgent than in the converse case, upon the supremacy of the federal government, and upon the position of the court as a part of the federal government.

¹ 192 U. S. 286.

² 204 U. S. 331.

CHAPTER III.

PRINCIPLES OF THE CONSTITUTION OF THE UNITED STATES GOVERNING SUITS AGAINST STATES.

The eleventh amendment and suits between States.

In *New Hampshire v. Louisiana* and *New York v. Louisiana*,¹ the plaintiff States brought suit in the supreme court on bonds of the State of Louisiana assigned to them by their citizens for collection, the States acquiring no beneficial interest, but simply allowing the use of their names for the purpose of suit. There are two possible modes of viewing these cases: first, as actions in behalf of their citizens by the States in their sovereign capacity; second, simply as ordinary actions by holders of a bare legal title.

Chief Justice Waite, who delivered the opinion, conceded the right to act thus in behalf of citizens as a "well recognized incident of national sovereignty"; but argued that the means are by diplomatic negotiations, treaty, and war, and that, since the States do not possess these attributes of independent nations, they cannot so act. Such, it is true, are the means between independent nations. But, although the States have lost these means, it has been repeatedly held that the constitution substituted a judicial remedy for controversies of a justiciable nature. The force of Chief Justice Waite's further argument—that the grant in the constitution of a direct remedy by citizens of one State against another State impliedly negated the indirect remedy, and that the taking away of the direct remedy by the eleventh amendment did not restore the indirect remedy—depends upon whether *Chisholm v. Georgia* be viewed as right or, as it is viewed in *Hans v. Louisiana*, as wrong.

Upon the other aspect of the case, it has been repeatedly

¹ 108 U. S. 76.

stated that jurisdiction was wanting because the plaintiff States had no real interest. But such a title is sufficient, on ordinary principles of law, to constitute the holder a real party to an action. The proper ground for the unanimous decision for dismissal is that the case was a palpable attempt to evade the eleventh amendment. As Justice White explained the case in *South Dakota v. North Carolina*:¹ "The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the States, since it was conceded that, but for the constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a State upon the claims of private individuals were absolutely prohibited by the eleventh amendment, such character of claim could not be converted into a controversy between States, and thus be made justiciable, since to do so would destroy the prohibition which the eleventh amendment embodied."

Some years later, South Dakota brought suit in the supreme court on bonds of North Carolina that had been assigned to her outright as an absolute gift. One motive of the donor was doubtless to make North Carolina pay, even if he got no benefit. A more substantial motive was the prospect that, if the suit by South Dakota were successful, North Carolina would be inclined to make a settlement with other bondholders, of whom he remained one. The question was whether such a suit was prohibited by the spirit of the eleventh amendment. The case might with good reason have been decided either way; and it is not surprising that the decision upholding jurisdiction was carried by only five to four. On the one hand, was the fact of the substantial interest of the State, and the absence of interest of individuals. On the other hand, the federal policy that prompted the grant of jurisdiction over controversies between States hardly extends to such a suit. Moreover, to allow such suits certainly opens the way, at least, as in the case in hand, to evasions of the eleventh

amendment. Justice White, in the able dissenting opinion, said: "My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the eleventh amendment is a mere letter, without spirit and without force." He argued that the obligations of a State taken up by individuals are without sanction, other than the good faith and honor of the sovereign itself; and that, if acquired by another State, they remain subject to the same conditions.

A compromise was suggested by Mr. Carman F. Randolph, writing in the *Columbia Law Review*: "If a State of the Union becomes indebted in due course to the United States, or to another State (perhaps to a foreign state), it is liable to suit. And this is so if evidences of debt, originally in private hands, come into public treasuries in due course. But where a claim is acquired by a government only because a private claimant cannot secure its payment, a suit for its recovery should be dismissed as an attempt to evade the eleventh amendment."¹ Such a distinction, even if practicable, has no real foundation in principle. The jurisdiction over controversies between States might, however, perhaps with better reason, have been held to include only cases arising directly between States, and not cases arising merely from the acquisition of choses in action.

Consent of State and jurisdiction of federal courts.

The courts of the United States, being courts of limited jurisdiction, cannot, even by consent of the parties, exercise jurisdiction not conferred by the constitution.² If, therefore, the constitution has not extended the judicial power to cases in which a State is party, consent of a State can-

¹"Notes on suits between States": *Col. L. Rev.*, II, 283.

²See *Postal Tel. Co. v. Ala.*, 155 U. S. 482, in which the supreme court of its own motion raised an objection to jurisdiction. Also, *Minn. v. Hitchcock*, 185 U. S. 373.

not confer it. The constitution did extend the judicial power in certain cases over suits by individuals against States. This might have been construed as allowing suits only with the consent of the States sued. In *Chisholm v. Georgia*, however, literal construction was adopted. Now, if the eleventh amendment had simply reversed this construction, jurisdiction might still have been entertained with the consent of the States sued. But the eleventh amendment did not stop there; it provided that "The judicial power shall not be construed to extend to any suit in law or equity commenced or prosecuted against any of the United States by citizens of another State, or by citizens or subjects of a foreign state." The effect was just as if the judicial power had never been extended to such cases. It would seem clear, therefore, that consent of the States cannot confer jurisdiction.¹

Of course, unless the immunity of the States from suits by individuals in cases not covered by the terms of the eleventh amendment be held to be due, not to the reversal of a rule of construction so as to uphold their natural immunity, but to a direct extension of immunity by the spirit of the eleventh amendment,² there is nothing to prevent jurisdiction with consent of the State in suits by individuals against States under clauses of the constitution not altered by the eleventh amendment.

Although the point is so clear, there is authority to the contrary in the supreme court reports. Justice Brewer, in *Reagan v. Farmers' Loan and Trust Company*,³ said it might well be argued that "the limitation of the eleventh amendment simply creates a personal privilege which can at any time be waived by the State," although it was unnecessary to go so far in that case. In *Smyth v. Ames*,⁴ Justice Harlan, in the opinion of the court, said of the objection that the suit was against the State: "This point

¹ See Wm. D. Guthrie: "The Eleventh Amendment": VIII *Col. L. Rev.*, 183.

² See above, p. 23.

³ 154 U. S. 362.

⁴ 169 U. S. 466.

is perhaps covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State board. It would, therefore, be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction," on the grounds both of diverse citizenship and of a federal question; although he went on to hold that the case was not a suit against the State. Now, if such a suit might be a suit against the State, it was manifestly the duty of the court, even on its own motion, to examine the question. Of course, if the view be taken of suits against public officers that, when jurisdiction is lacking, it is not because in effect suits against States, but because there is no real ground of action against the defendants, this criticism is not in point.¹ The same remark applies to *Illinois Central Railroad Company v. Adams*,² in which the court held that a motion to dismiss for lack of jurisdiction is not the proper method of objection on this ground. It does not, however, cover the argument of Justice Harlan in his dissenting opinion in *Ex parte Young*,³ explaining away the *Reagan* and *Smyth* cases as forms of suits against themselves which the States had permitted. This position of Justice Harlan, involving the opinion that consent of a State may give jurisdiction of a case within the terms of the eleventh amendment, must, however, be viewed in the light of its argumentative purpose; it is contrary to his expressions in other cases, and, as to *Smyth v. Ames*, involves a distorted explanation of the case, and the contradiction of the unanimous opinion in *Smith v. Reeves*, written by himself, that a State may restrict its consent to be sued to its own courts.

A number of cases in which States have provided for suits against themselves have come up to the supreme court on writs of error from the highest State courts.⁴ In all

¹ See below, Part II, Chap. VIII.

² 180 U. S. 28.

209 U. S. 123.

⁴ *Curran v. Arkansas*, 15 How. 304; *Beers v. Arkansas*, 20 How. 527; *M. & C. R.R. Co. v. Tenn.*, 101 U. S. 337; *So. & North. Ala. R.R. Co. v. Ala.*, 101 U. S. 832; *Hall v. Wisc.*, 103 U. S. 5.

such cases, it is taken for granted that the consent of the State has waived the question of jurisdiction. So far as I have been able to discover, however, none of these cases was brought by a citizen of another State; so that the eleventh amendment did not directly apply, and the attitude of the court was entirely proper. Justice Harlan, in *General Oil Company v. Crain*,¹ stated that "it was long ago settled that a writ of error to review the final judgment of a State court . . . is not a suit within the meaning of the eleventh amendment. *Cohens v. Virginia*, 6 Wheat. 264." Now, *Cohens v. Virginia* decided no such thing. It decided simply that a proceeding on writ of error is merely a continuation of the case below. In *Cohens v. Virginia*, the suit was brought not against the State, but by the State, so that the eleventh amendment could not apply; and the character of the suit was not changed by the writ of error. This very reasoning would bar from the federal courts a suit that is in its origin a suit against the State by a citizen of another State, just as much on writ of error as by original suit.

In *Clark v. Barnard*,² a railroad company gave to the State of Rhode Island a bond for \$100,000, conditioned on completing a portion of road within a certain time. As security, the railroad company loaned \$100,000 to the city of Boston, for which the latter gave its note to the treasurer of Rhode Island. The road becoming insolvent, after the time named in the bond, the receiver brought suit in the United States circuit court, on the ground of diverse citizenship, against the treasurer of Rhode Island and the city of Boston, alleging that the bond was invalid, for a decree ordering the treasurer to give back the note of the city of Boston, and enjoining him from receiving the money and the city from paying it over, and for the restoration of the money to the railroad. The treasurer demurred on the ground that it was in effect a suit against the State; but the demurrer was overruled. The court required the city of

¹ 209 U. S. 211.

² 108 U. S. 436.

Boston to pay the \$100,000 into court, with leave to the State to prove any damages it might have sustained on account of the breach of the condition of the bond. The State then became a party claimant to the fund, "without prejudice to the demurrer of the treasurer." The State proved no damages, and the funds were awarded to the railroad. On appeal, the supreme court held the State entitled to the funds, on the ground that the bond became forfeited on breach of the condition, without proof of damages.

What is in point here is the ruling on the question of suit against the State. Justice Matthews, speaking for the court, said: "We are relieved, however, from its consideration, by the voluntary appearance of the State in intervening as a claimant of the funds in court. The immunity from suit belonging to a State, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege, which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . It became an actor as well as defendant."

Now, if the case could be regarded as a suit by the State, it would be all right. But the difficulty is that the State could not bring such a suit in the United States circuit court; for the circuit courts have no jurisdiction of suits between a State and a citizen of another State, unless a federal question is involved.¹ On the other hand, if the court had jurisdiction of the original suit, the fact that the State became a party would not oust the jurisdiction once attached.² But the court expressly said that it was not necessary to decide whether the suit was obnoxious as a suit against the State, because the State was a voluntary party. Moreover, although the circuit court held the original suit was not in effect a suit against the State, it is very debatable whether the State was not an indispensable party. So that, strictly

¹ Postal Tel. Co. v. Ala., 155 U. S. 482.

² Phelps v. Oaks, 117 U. S. 236.

analyzed, the case may be regarded as holding squarely that consent of the State sued may confer jurisdiction in a case within the terms of the eleventh amendment. If this holding is to be explained away, it may, perhaps, best be done on the ground that the State became a party plaintiff, and that the court overlooked the objection to such a suit by the State.

Not quite so difficult to justify is *Gunter v. Atlantic Coast Line Railroad Company*.¹ In *Humphrey v. Pegues*,² had been sustained a decree of a United States circuit court, enjoining certain county treasurers of South Carolina from proceeding to collect a tax on a railroad company, declared unconstitutional as a violation of a contract exemption. Twenty-five years later, the State by law directed the attorney general to bring suit to recover taxes to be assessed for ten years back on railroad property that had been off the books. The suit of *Gunter v. Atlantic Coast Line Railroad Company* was brought as ancillary to *Humphrey v. Pegues*, to restrain suit under the act for taxes that had been declared unconstitutional in that case. The court avoided the necessity of deciding whether the new suit by itself was open to objection as a suit against the State, by holding that *Humphrey v. Pegues* was an action under a State law construed as providing therefor as a form of action against the State, and that, since the State was a party bound by the decision in that case, the present action, even if a suit against the State, was a proper proceeding to enforce that decision.

That the court was of opinion that consent of a State may waive the limitations of the eleventh amendment is evident from the statement in the opinion of the court, written by Justice White, of the "elementary propositions"; that "In view of the prohibitions of the eleventh amendment . . . , a State, without its consent, may not be sued by an individual in a circuit court of the United States," and that "Although a State may not be sued without its consent,

¹200 U. S. 273.

²16 Wall. 244.

such immunity is a privilege which may be waived." This decision may, however, readily be sustained on other ground: to wit, that *Humphrey v. Pegues* in its inception was clearly a proper suit against the county treasurers as individuals, and that, when the defense in accordance with the State law made it also a form of action against the State, this development did not divest the jurisdiction that had already attached.¹

In view of the peculiar circumstances of *Clark v. Barnard* and of *Gunter v. Atlantic Coast Line Railroad Company*, the question may fairly be regarded as not finally settled. It is so clear on principle that consent of a State cannot remove the limitations of the eleventh amendment, that, if the question is squarely presented and argued, the court may yet so hold.

Restriction of consent to State courts.

In *Smith v. Reeves*,² it was held, as an exception to the general principle that where a suit may be maintained in a State court the State cannot prevent resort to the federal courts if the requisites for federal jurisdiction are present, that a State, in allowing suits against itself, may limit such suits to its own courts, to the exclusion of the federal courts.³ This decision is well based on the ground that a remedy by an individual against a State is purely a matter of grace, subject to such conditions as the State may choose to impose.

In the same case, however, it was stated by Justice Harlan, in the opinion of the court, that the right of the State is "subject always to the condition, arising out of the supremacy of the constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State, in any action brought against

¹ *Phelps v. Oaks*, 117 U. S. 236.

² 178 U. S. 436.

³ Under the view urged in the last section, a suit against a State within the prohibition of the eleventh amendment is without the jurisdiction of the federal courts, even with the consent of the State.

it with its consent, may be reviewed or reexamined, as prescribed by the act of congress, if it denies to the plaintiff any right, title, privilege, or immunity secured to him and specially claimed under the constitution or laws of the United States." Justice Holmes, also, in *Chandler v. Dix*,¹ said: "Of course, a taxpayer denied rights secured to him by the constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest court of the State." The point has not, however, been decided. With due respect for the dicta of the learned justices, I can see no reason whatever why, if the grant of a remedy against itself is a matter of grace on the part of the State, it may not exclude the jurisdiction of the supreme court just as well as of the circuit courts of the United States.

Withdrawal of consent and impairment of the obligation of contracts.

In *Memphis and Charleston Railroad Company v. Tennessee*,² the principle that an impairment of the remedy is an unconstitutional impairment of the obligation of the contract was invoked against the State. The supreme court held, however, that, since the remedy withdrawn had conferred on the State court no power to execute the judgment, which remained dependent on an appropriation by the legislature, it was not such an effective judicial remedy as to come within the principle.³

In the earlier case of *Beers v. Arkansas*,⁴ it had been held that a general law allowing suits against the State did not become part of a contract. And this was necessarily the view of the four justices concurring in the opinion written by Justice Matthews in *Antoni v. Greenhow*,⁵ and of the four dissenting justices in *Poindexter v. Greenhow*,⁶ where

¹ 194 U. S. 590.

² 101 U. S. 337.

³ Reaffirmed in *So. & No. Ala. R.R. Co. v. Ala.*, 101 U. S. 832.

⁴ 20 How. 527.

⁵ 107 U. S. 760.

⁶ 114 U. S. 270.

the remedy was judicially effective.¹ This position is justified on the ground that the remedy given is purely a matter of grace.

It is different, however, where an effective remedy is in terms made part of a contract. Suppose, for instance, a State issued bonds containing a mortgage of certain property,² and granting to the bondholders the right to sue for the enforcement of the mortgage. It would seem clear that the withdrawal of this right would be an unconstitutional impairment of the obligation of the contract, and that a federal court having jurisdiction ought to disregard the withdrawal and enforce the remedy. Yet, in *Antoni v. Greenhow*, it was evidently the opinion of Justice Matthews and the three justices concurring with him, that a State may withdraw a remedy against itself, even if it impairs the obligation of a contract. It was squarely stated by Justice Matthews in *Ex parte Ayers*.³ Such is, also, the logic of the decision in *Louisiana v. Jumel*.⁴ In my view, this is clearly wrong.

¹ The decisions in these cases did not involve a denial of this position.

² As in *South Dakota v. N. Car.*, 192 U. S. 286.

³ 123 U. S. 443.

⁴ 107 U. S. 711. See Part II, p. 71.

CHAPTER IV.

SCOPE OF THE DOCTRINE OF NON-SUABILITY—FORMS OF ACTION.

Actions that are suits against the state.

The principle of immunity is not limited to any particular forms of action. It extends to actions in rem, as, for example, to enforce a lien against property of the state,¹ or foreign attachment against such property,² as well as to actions in personam. It prevents the attachment of funds in the hands of officers of the United States, due as wages to seamen, by creditors of the seamen.³

In the case of admiralty proceedings in rem, it is true, there has been some disposition to regard the exemption of government property as due, not to the immunity of the government from suit, but to the exemption from liens of certain classes of property of a public or religious character, and to restrict the exemption of government property to what is used for a public governmental purpose. This question, however, has been sufficiently discussed above;⁴ where is set out the better view that an admiralty proceeding in rem is simply a form of suit against the owner of the res.

In "The Davis,"⁵ the principle of exemption of all property of the government was recognized without exception. The court was, however, led astray by *United States v. Wilder*,⁶ and by placing a false emphasis on the fact of possession. In *United States v. Wilder*, the United States

¹ The great leading case is *Briggs v. Light-boats*, 11 Allen 157.

² *Nathan v. Va.*, 1 Dall. 77. (Common Pleas, Phila. Co., Pa.)

³ *Buchanan v. Alexander*, 4 How. 20.

⁴ P. 13.

⁵ 10 Wall. 15.

⁶ 3 Sumner 308.

brought suit in trover for certain clothing, property of the United States, which was being held by a carrier for a lien for general average. Justice Story held that, where it was necessary for the United States to bring suit to recover the goods, the carrier might assert against the United States his right to retain the goods for the lien. In "*The Davis*," a cargo of cotton belonging to the United States became liable to a lien for salvage. It remained in the possession of the carrier, and was libelled along with the ship by the salvors. The supreme court held that the exemption of government property exists only where it would be necessary to take the property out of the possession of agents of the government, and that, since "*The United States*, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton," under these circumstances, "it was the duty of the court to enforce the lien of the libellants for the salvage, before it restored the cotton to the custody of the officers of the government."

Now, the decision in *United States v. Wilder*, that one in possession of property of the government may assert his rights with respect thereto, was clearly correct. But one mode of asserting such rights, namely, by suit, is precluded by the immunity of the state from suit. Whether the government has possession or not certainly does not make the action more or less a suit against the state. In *Young v. Steamship Scotia*,¹ the judicial committee of the privy council flatly said, although obiter, that "the question of possession is immaterial." The decision, but not the opinion delivered by Justice Miller, in *The Davis*, may be sustained on the ground that the United States did not merely object to the libel, but became an active claimant of the goods; and that its claim was subject to the liens of other parties.²

The immunity of the state precludes not only suits directly against the state, but also suits, otherwise well brought between proper parties, towards which the state stands in such

¹89 L. T. 374.

²See below, p. 42.

a relation as to be an indispensable party. There is a class of parties, called necessary parties, who ordinarily must be joined to a suit, but who, if to join them would defeat jurisdiction, may be dispensed with. Such is the position of joint makers of a promissory note. On the other hand, there are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."¹ These are indispensable parties, without whom the court will not proceed with the case.

In *Cunningham v. Macon and Brunswick Railroad Company*,² it was held that where the State was the holder of the legal title under a deed of trust to secure it on its endorsement of the bonds of a railroad company, it was an indispensable party to a suit against the railroad company to foreclose the mortgage of one issue of bonds.

In *Christian v. Atlantic and North Carolina Railroad Company*,³ a bill was brought against a railroad company to have certain shares of stock owned by the State, and dividends thereon, applied to State bonds issued in aid of the railroad, for which the State had pledged the stock. The bill was dismissed on the ground that the State was an indispensable party.⁴

A state may be a party to a suit not only in its own name, but also under other forms. Thus, in *Smith v. Reeves*,⁵ the State had allowed suit against itself in the form of an action against the State treasurer. In *Gunter v. Atlantic Coast*

¹ *Shield v. Barrow*, 17 How. 130; quoted in *Cunningham v. M. & B. R.R. CO.* The doctrine of parties is best developed in the class of cases in which jurisdiction of the federal courts is dependent on diverse citizenship.

² 109 U. S. 446.

³ 133 U. S. 233.

⁴ In *Case v. Terrell*, 11 Wall. 199, also, although the ground of dismissal was stated to be simply that the only substantial relief was against the United States, with respect to the decree against enforcement of the priority of the United States in the distribution of assets, the United States was in the position of indispensable party.

⁵ 178 U. S. 436.

Line Railroad Company,¹ it was held that *Humphrey v. Pegues*² was a form of action the State had allowed against itself. And, in *Minnesota v. Hitchcock*,³ jurisdiction of a suit against the secretary of the interior was sustained on the ground that it was a suit against the United States with its consent.

The court seems to have overlooked this obvious fact in *Missouri, Kansas and Texas Railroad Company v. Missouri Railroad and Warehouse Commission*.⁴ In that case, a petition for removal to the federal court, on the ground of diverse citizenship, of an action brought under a statute by the State railroad and warehouse commissioners for an injunction to compel obedience to an order, was denied by the State court on the ground that it was a suit by the State; the decision was reversed on writ of error by the supreme court. The court was evidently under the influence of Justice Brewer's queer idea that the governmental interest of a state in the enforcement of its laws is not such an interest as to make it a party to a suit.⁵ This idea was evolved to meet a conceived necessity of explaining a case like *Reagan v. Farmers Loan and Trust Company*, to enjoin suits to enforce rates, as not a suit against the State. But the proper explanation of such a case is not that the State has not sufficient interest to be a party,⁶ but that, despite such interest, the agents of a State may be restrained from violating constitutional rights.⁷ The idea of Justice Brewer is negated by the everyday fact of criminal proceedings by the state to enforce its laws, and especially by such cases as *In Re Debs*,⁸ in which the state brings suit in equity to enforce its governmental rights and

¹200 U. S. 273.

²16 Wall. 244.

³185 U. S. 373.

⁴183 U. S. 53.

⁵Previously expressed by him in *Reagan v. Farmers L. & T. Co.*, 154 U. S. 362.

⁶For in *Gunter v. Atl. Coast Line R.R. Co.*, 200 U. S. 273, the court held that the State was a party to a similar case—*Humphrey v. Pegues*, 16 Wall. 244.

⁷Part II, Chaps. V, VI.

⁸158 U. S. 564.

duties. In the very case in hand, Justice Brewer recognized that such a case as *Ferguson v. Ross*,¹ in which suit to recover a penalty was brought, as provided by law, in the name of a State shore inspector, was a suit by the State. His distinction is that in a suit to recover a penalty, the judgment inures to the benefit of the State, whereas in a suit to enforce an order, the State has no pecuniary interest, but only the shippers. The idea that the penalty recovered is the interest that sustains a prosecution by the state becomes absurd when the penalty is not money, but imprisonment. The only proper question in the case in hand was whether the suit was a form of action by the State; and that was concluded by the decision of the State courts. The supreme court was led into this error by the fact that the apparent parties were the same as they would have been in a suit against the commissioners to restrain the enforcement of an order, and that such a suit would not be a suit against the State.

Actions that are not suits against the state.

It was early settled that the fact that the state is a stockholder, even the sole stockholder, in a corporation, does not relieve the corporation from suit.² The corporation is a personality of private law, distinct from its stockholders.

It is equally well settled that, when the state brings suit, the defendant may carry the case up by appeal or on writ of error. Such proceeding is but a continuation of the case, and does not convert it into a suit against the state.³

More important, as affecting the immunity from suit, is the doctrine that, when the state comes into court to enforce a right, its recovery is subject to the rights of others in the subject matter of the suit. Thus, in *United States v. Wilder*,⁴ an action of trover for property of the United States was barred by the right of defendant to retain it for a lien for general average. The principle has its widest scope in

¹ 38 Fed. 161.

² *Bank of U. S. v. Planters' Bank of Ga.*, 9 Wheat. 904.

³ See the great case of *Cohens v. Va.*, 6 Wheat. 264.

⁴ 3 Sumner 308.

cases in admiralty, where, when the res is brought within the jurisdiction of the court, all claims are presentable. In "*The Siren*,"¹ the vessel, on libel by the United States, had been condemned as prize of war, and the proceeds deposited with the assistant treasurer of the United States, subject to the order of the court. It was held that the funds were liable to a claim for a lien against the vessel growing out of a collision while being brought into port for condemnation.²

The same principle applies to the right of set-off and counterclaim by defendants to suits brought by the state. The extent of this right varies, of course, with the rules governing the procedure of the court. The right of set-off is statutory; and the state may limit the right of set-off against itself to cases in which certain conditions have been complied with, as, for instance, that the claim shall have been previously presented and allowed.³ The general principle is that the right of set-off or counter-claim against the state extends to any claim, legal or equitable, that operates by way of direct defense to the suit;⁴ but does not warrant a separate claim, or a demand for original and independent relief, since that would be in effect a suit against the state.⁵ It is well settled that a judgment cannot be entered against the state for a balance on a set-off.⁶ Nor can a judgment be entered against the state for costs.⁷

In *United States v. McLemore*,⁸ it was held that, although a circuit court of the United States, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently may examine the grounds on which such an entry is claimed, and may direct

⁷ Wall. 152.

See also "*The St. Jago de Cuba*," 9 Wheat. 409; and "*The Davis*," 10 Wall. 15.

³ *U. S. v. Eckford's Extrs.*, 6 Wall. 484.

⁴ *U. S. v. McDaniel*, 7 Pet. 1; *U. S. v. Ringgold*, 8 Pet. 150; *Gratiot v. U. S.*, 15 Pet. 336.

Pres. & Direc. etc. v. Ark., 20 How. 530.

Reeside v. Walker, 11 How. 272; *U. S. v. Eckford's Extrs.*

U. S. v. McLemore, 4 How. 286 (cases cited).

⁴ How. 286.

the execution to be stayed until such an investigation shall be made, it cannot entertain a bill on its equity side to enjoin the United States from proceeding upon such judgment, since that is a suit against the United States. In *Hill v. United States*,¹ the doctrine is reaffirmed that execution upon a judgment in favor of the United States may not be enjoined. In *Bouldin v. State*,² on the contrary, it was held that such a suit to restrain execution, upon the ground that the bond on which the judgment was obtained was executed without consideration, is not a suit against the State, but simply setting up a defense that might have been availed of in the original suit.³

¹9 How. 386.

²21 Ark. 84.

³In the United States, it is agreed, consent to suit against the state can be given only by the legislature; the executive does not possess the prerogative of the crown in this respect. *U. S. v. Lee*, 106 U. S. 196; *Stanley v. Schwalby*, 162 U. S. 255; *Case v. Terrell*, 11 Wall. 199; *Carr v. U. S.*, 98 U. S. 433.

In case of consent, the state has full control over the proceedings. *De Groot v. U. S.*, 5 Wall. 419; *Beers v. Arkansas*, 20 How. 527. Possible exception as to the substantive law—see *U. S. v. Klein*, 13 Wall. 128.

PART II.

SUITS AGAINST PUBLIC OFFICERS.

CHAPTER I.

THE PRINCIPLE OF LIABILITY IN TORT.

The first part of this study has dealt with the doctrine of non-suability of the state, and the extent to which it applies to the States of the United States. In the last chapter, has been set out the scope of the doctrine—what forms of action are suits against the state, and what proceedings, though affording judicial remedy against the state, are not within the prohibition. In this second part, will be considered suits against public officers, in relation to the immunity of the state from suit.

It was early settled in English law that, although the crown may not be sued for torts done by public officers, the actors themselves may be held liable, and that it is no defense to set up an unlawful authority from the crown. An act of parliament is, of course, always lawful authority. But where a statute may be held unconstitutional, as in the United States, it furnishes no better defense than the unlawful order of a higher executive officer.

The lack of valid defense in an unlawful authority from the crown has been rested upon the maxim that "the king can do no wrong." To authorize a wrong, it is said, is to do a wrong; hence, in the eye of the law, the alleged authority cannot exist. This maxim must mean one of two things. First, that whatever the king does is right; with the necessary corollary that whatever the king authorizes is right. Practically, this was, no doubt, for a time in large measure true; and the king's servants acting as judges made no pretense of exercising jurisdiction over the king's servants

acting for him in other ways. But the doctrine of absolute immunity was soon definitely negated. Second, that no wrong will be imputed to the king. In this view, it is a senseless fiction. A more rational explanation is that, although the king may do wrong, he is protected by his immunity from suit. If he does wrong through an agent, the agent is liable, although the king is not.

The state, of course, can act only through agents. The agent, in committing a tort, may be regarded either as not acting for the state, in which view the agent alone would be liable, or as acting, although unlawfully, for the state, in which view both principal and agent would be liable, although the principal would be protected by the immunity of the state from suit. In either view, the liability of the agent results from the fact that his act is in itself unlawful, and does not rest upon lawful state authority. Such authority cannot exist if forbidden by a higher authority. Thus, a statute cannot afford lawful authority if contrary to the constitution.

CHAPTER II.

INJUNCTION AGAINST TORT.

In the great case of *Osborn v. Bank of United States*,¹ was presented the question whether a public officer, about to commit a tort under a statute alleged to be unconstitutional, may be enjoined therefrom if equitable ground exists. An act of Ohio imposed a tax of \$50,000 a year on each branch of the Bank of the United States situate in Ohio, and instructed the State auditor to issue his warrant for distraint therefor in case of failure to pay. The bank brought suit in the United States circuit court to enjoin the auditor from proceeding to collect the tax, upon the ground that it was unconstitutional—as it was, in fact, held in this case. The part of the decision of the supreme court in point here is the affirmance of the decree granting this injunction.

The remedy of injunction against public officers had been used in England, though very sparingly.² Chief Justice Marshall, however, as usual, cited no precedents.

One contention of appellants was that, admitting that in an action for damages the statute would be no justification if found unconstitutional, but that the State officers must be treated as individual trespassers, yet there existed no ground for equitable relief. Chief Justice Marshall answered thus: "The appellants treat the declaration of *Osborn*, the auditor, that he should execute the law, as the light and frivolous threats of an individual that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the State; and had made it the duty of the auditor to execute it as a minis-

¹9 Wheat. 738.

²Goodnow: *Admin. Law of the U. S.*, p. 420 et seq.

terial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges so far as they were to be exercised in the State. . . . It was to be expected that a person continuing to hold an office would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the bank should abandon the exercise of its chartered rights.”¹ That is, it was decided, in determining whether equitable grounds exist, it will be presumed that an officer will perform a duty laid upon him by statute, and the nature of the threatened tort will be determined by the statute under color of which he is about to act.

The main argument of appellants was, as stated by Chief Justice Marshall, as follows: “The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the State from executing the law. It is, then, a controversy between the bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the court ought not to proceed without making the State a party. If this cannot be done, the court cannot take jurisdiction of the cause.”²

Opinions in similar cases have often put the ruling that the suits were not against the State upon the ground that an officer, when acting under an unconstitutional statute, is not acting for the State, and the State has no interest. But it requires the exercise of jurisdiction to find the statute unconstitutional; and if it is found valid, then it follows, upon this view, that the court has exercised jurisdiction over a suit against the State. Anyhow, the State clearly has an

¹ P. 839.

² P. 846.

interest in determining whether the statute under which its officers are acting is unconstitutional. This is proved by the fact that the State may join as party defendant in such a case.¹ Chief Justice Marshall did not deny the interest of the State: "The full force of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court."² "But," he said, "if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from judicial process, it would be subversive of the best established principles to say that the law could not afford the same remedies against an agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit." The action against the officers was upheld on the ground of the personal and separate liability of an agent for his tort, though done for a principal. "It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court also be applied to him?"

The doctrine of *Osborn v. Bank* has not since been questioned. In *Dodge v. Woolsey*,³ a similar case, the objection of suit against the State was not raised. And, in *Poin-dexter v. Greenhow*,⁴ Justice Matthews, speaking for the court, said of enjoining the collection by State officers of unconstitutional taxes: "The practice has become common, and is well settled on uncontrovertible principles of equity procedure."⁵ Certainly, if *Osborn v. Bank* had been decided

¹ In *Gunter v. Atl. C. L. R.R. Co.*, 200 U. S. 273, the State was held to have become a party to the original suit.

² P. 846.

³ 18 How. 331.

⁴ 114 U. S. 270.

⁵ The four dissenting justices did not deny this, but considered

differently, constitutional limitations would have been dead letters. The doctrine that a public officer may be restrained, in a proper case in equity, from committing a tort under color of an unlawful authority, has, so far as I know, never been denied by a State court. Objection was made in *Osborn v. Bank*, probably, not so much in denial of this general doctrine, but from a failure to appreciate fully that the constitution of the United States operates upon State enactments just as a State constitution operates upon State statutes. It was a period of general protest against the growing national supremacy over the States.

The decision in *Osborn v. Bank* was clearly right. To enjoin state officials does affect the state more closely than to hold them liable in damages. The state cannot itself act, as can the king; and, if every agent is restrained, the state cannot act at all. But this intrinsic limitation of the state should not affect the remedy against its agents. The principle is that every person is liable for his own torts, even though acting as agent. If a public officer would be liable in damages for an act, there is no reason why, if equitable grounds exist, he should not be enjoined from the act.

The only case in which the supreme court has departed from this doctrine is *Belknap v. Schild*.¹ In that case, a

that, the taxes being valid, the right to have the coupons received therefor was merely a right of set-off, and that any suit to restrain the collection of the taxes was in effect a suit to compel the State to fulfil the contract to receive the coupons for taxes. Later, in *McGahey v. Va.*, 135 U. S. 662, Justice Bradley, who delivered the dissenting opinion in *Poindexter v. Greenhow*, admitted that the view of the majority was probably correct—that the tender of the coupons worked a defeasance of the taxes, so that the collection of them thereafter was a tort, just as if they were unconstitutional in the first place. Congress, in the exercise of its control over remedies in the federal courts, has provided that the remedy of injunction shall not be used to restrain the collection of unconstitutional federal taxes. Of course, congress cannot remove the liability of the officers, but it seems it can control the remedy, to the extent at least of confining the injured party to his remedy at law. State legislation cannot, of course, affect the power of the federal courts in the administration of their regular equitable remedies. In *re Tyler*, 149 U. S. 164.

¹ 161 U. S. 10.

bill in equity was brought by the owner of a patent against officers of the United States, in charge for the United States of a caisson gate, the property of the United States, made in infringement of the patent, and used in a drydock at a navy-yard of the United States. The court recognized that the officers would be liable in damages; but held that no injunction could issue, since that would prevent the use by the United States of its own property, in its possession.¹

Justice Gray, delivering the opinion of the court, said: "The United States, then, had both the title and the possession of the property. The United States could not hold or use it except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession." This argument, except for the fact that title here was undisputed, is exactly the same as in Justice Gray's dissenting opinion in *United States v. Lee*,² and the case can only be explained as enforcing his opinion there. It is true he distinguished *United States v. Lee* on the ground that title to the land was disputed in that case. But surely the United States has as direct an interest in property which it holds by a disputed title as by an undisputed title. The cases Justice Gray cited as holding that "no injunction can be issued against officers of a State to restrain or control the use of property in the possession of the State or money in its treasury"—*Louisiana v. Jumel and Elliot v. Wiltz*,³ *Cunningham v. Macon and Brunswick Railroad Company*,⁴ *Hagood v. Southern*⁵—were cases of an entirely

¹ Justice Bradley had strongly intimated a similar view in *James v. Campbell*, 104 U. S. 356, although the case had been decided upon the ground that the patent was invalid. This dictum was not mentioned in *Belknap v. Schild*.

² 106 U. S. 196.

³ 107 U. S. 711.

⁴ 109 U. S. 446.

⁵ 117 U. S. 52.

different nature. They were suits to obtain property of the State; not one of them was to prevent a tort. They clearly support the decision, in *Belknap v. Schild*, that no decree for the destruction of the property of the United States used in infringement of the patent could be rendered in a suit against the officers. Just as clearly, they are not in point upon the question of the injunction.

It seems strange that *Belknap v. Schild* should have been so decided after *United States v. Lee*. In the latter case, ejectment was upheld against officers of the United States, in possession of land claimed by the United States, on which the United States had valuable improvements used in the public service. The case held squarely that a public officer may be held liable for a tort, and that the court will inquire into the defense—in that case depending on the title of the United States. The direct interest of the United States did not prevent relief. In *Belknap v. Schild*, the suit was to prevent a tort; the validity of the defense depended on whether the caisson gate was an infringement of the patent. The fact that property of the United States was used in committing the tort should not have prevented relief. This is established by such a case as *Ex parte Young*,¹ in which public officers were enjoined from acts not possible to them as individuals, but consisting in using their official positions to violate constitutional rights. That the United States could use its property only through agents was no ground for denying relief against the torts of its agents, any more than in *United States v. Lee*.

Justices Harlan and Field dissented in *Belknap v. Schild*. Justice Peckham took no part in the decision. In the next similar case, *Dashiell v. Grosvenor*,² the question was evaded by holding that there was no infringement. In *International Postal Supply Co. v. Bruce*,³ *Belknap v. Schild* was reaffirmed, and an injunction denied to restrain the postmaster at Syracuse from using, in infringement of

¹ 209 U. S. 123.

² 162 U. S. 425.

³ 194 U. S. 601.

a patent, stamping-machines, hired by the United States postoffice for a term of years. Justice Harlan again dissented, and Justice Peckham concurred in the dissent.

In a State case, *Hopkins v. Clemson Agricultural College*,¹ the court denied relief, in a suit against the trustees of the Clemson Agricultural College, incorporated, an agent of the State, against a dike erected on the college grounds so as to cause the water to overflow the lands of plaintiff as it would not naturally do. The court put the decision on the ground that the State was an indispensable party to a suit to affect the dike, its property, on its property. But any effective relief in this case would have required a decree for the destruction of the dike, which, of course, could not be rendered in a suit against the agent of the State. In *Salem Flouring Mills Co. v. Lord*,² State officers were enjoined from using more water from a stream than the State was entitled to under a contract by which it acquired the right to use a certain amount. The court said that the decree could not affect the property of the State. But, since the decree enjoined the use of any appliance capable of taking more water than proper, and such an appliance owned by the State was being used therefor, it seems to have enjoined the use of property of the State. The remark of the court must be limited, therefore, to mean that the property of the State could not be directly acted upon, that is, removed, altered, or destroyed.

The decision in *Belknap v. Schild* seems unfortunate. As Justice Harlan pointed out, it permits any patent capable of use in the public service to be used by the government at will, thus nullifying, to that extent, the constitutional inhibition against taking private property for public use without just compensation. It operates to deny preventive relief against a wrong in any case in which property of the state is used in committing the wrong. In my view, the decision is fundamentally wrong.

¹ 77 S. C. 12.
² 42 Ore. 82.

CHAPTER III.

SUITS TO RECOVER PROPERTY IN THE POSSESSION OF PUBLIC OFFICERS.

Also growing out of the separate liability of an agent in tort, is the right to sue a public officer for the recovery of property alleged to be tortiously held by him. The direct interest of the state in such a case, in which the defense is claim of title in the state, is evident. But *Osborn v. Bank* had established that, where a right of action exists against a public officer, it is not barred by the fact that it directly affects the state.

In *Osborn v. Bank*, Chief Justice Marshall said that he could perceive no line of distinction, where a public officer was guilty of a trespass under color of an unconstitutional tax, between an action for damages and an action of detinue for recovery of specific articles taken in collection of the tax. *Poindexter v. Greenhow*¹ was an action of detinue.

The case of *Governor of Georgia v. Madrazo*² was as follows. In 1817, a cargo of slaves belonging to Madrazo was seized by a privateer, and sold to Bowen by decree of a court not recognized as competent by the United States. While being transported through the Floridas, the slaves were brought within the limits of the State of Georgia, and were seized by a revenue officer under an act of congress annulling the title of any importer of slaves. As provided by the act, the slaves were turned over to the governor of the State. Part of them were sold by him, and the money deposited in the State treasury. Madrazo, claiming that the slaves were his, and that he was not responsible for their importation into Georgia, brought a libel in the United States district court against the governor of Georgia for

¹ 114 U. S. 270.

² 1 Pet. 110.

the slaves remaining in his possession and for the proceeds from the sale of the rest. Chief Justice Marshall plainly regarded the action as a form of suit against the State; and, since the libel was to reach moneys in the treasury, of which the governor had not even possession, it is probable that the service on him was intended as service on the State, on the theory, as adopted by Justice Johnson in his dissenting opinion, that the eleventh amendment does not apply to suits in admiralty. But even if the governor could be considered as a defendant in his personal character, Chief Justice Marshall said, no case was made out against him personally. The slaves had come into his possession in perfectly lawful manner. The action, therefore, was not against him for wrongful possession, but rather in the nature of a suit to enforce an equitable claim to the slaves. Since the governor had no personal interest in the slaves, the claim was not against him. Consequently, the right of action was not against him.

In *United States v. Peters*,¹ was involved the validity of a decree of a United States district court. Certain Americans, Olmstead et al., captured by the British during the war of revolution, rose and captured the vessel on which they were put to service. While on the way to port, the vessel was taken in charge by a ship-of-war of the State of Pennsylvania. The court of admiralty of Pennsylvania, in condemning the vessel as prize of war, decreed only one-fourth to Olmstead et al., and the rest to the State. On appeal, the court of appeals for prize cases, set up by the continental congress, decreed all to Olmstead et al. The Pennsylvania court refused to accept the decree, on the ground that it involved a review of facts found by a jury, and decreed sale and distribution. The marshal, despite an injunction from the court of appeals, turned over the share of Pennsylvania to Rittenhouse, the State treasurer, who gave a bond of indemnity therefor to the judge of the admiralty court. Rittenhouse, and, on his death, his executors, held the funds separate, refusing to deliver them

¹ 5 Cranch 115.

to the State until released from the bond to the admiralty judge. In 1803, the United States district court, in a suit in admiralty by the successors to the rights of Olmstead et al. against the executrices of Rittenhouse, decreed that the funds be delivered up to the libellants. It was strongly urged that the decree was invalid on account of the claim of the State. But Chief Justice Marshall said: "The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. . . . It can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their examining the validity of the title."

Justice Gray, in *United States v. Lee*, limited *United States v. Peters* by the fact that the funds were in the possession of the libellees in their private capacity. "The chief justice," he said, "carefully avoided expressing an opinion upon a case in which the money sued for was in the possession of the State." It is true Chief Justice Marshall did advert to the fact that the funds were held in a private capacity. And he also said in the course of the opinion: "If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of the fact would have presented a case on which it is unnecessary to give an opinion." It is difficult to understand just what the chief justice meant by this. But, in view of the fact that he plainly said that the State could not acquire title, on account of the decree of the court of appeals, and declared, "the full right was immediately invested in the claimants, who might rightfully pursue it into whosoever hands it might come," the statement of Justice Gray finds little support. There seems, indeed, no distinction in principle between a case of wrongful possession by a public officer of property claimed by the state, and

wrongful possession in a private capacity of like property. The basis of the action in either case is the wrongful possession by the person sued; the defense in either case depends upon the title of the state.

If actions at law may be maintained for the recovery of property wrongfully in the possession of public officers, then it naturally follows that, if equitable grounds exist, equitable relief may be had in such cases. In *Osborn v. Bank*, if the original injunction against the collection of the tax was proper, then of course the decree for restitution was simply an enforcement of the original decree. But Chief Justice Marshall also held that, even if the original injunction was improper, the injunction upon the amended bill, enjoining the officers from disposing of the funds, and decreeing restitution, was sustainable. The equitable ground was that, if the funds were disposed of, they would be irretrievably lost to the plaintiffs, because the State could not be sued.

Chief Justice Waite, in *Louisiana v. Jumel*,¹ explained away the decree for restitution in *Osborn v. Bank* thus: "Under the state of facts, the order for its return involved no question of power to interfere with what was actually in the treasury. . . . The money was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back." But the funds had actually been covered into the treasury, where they were kept separate by the treasurer; the decree ordered the treasurer to restore them. The explanation by Justice Miller, in *Cunningham v. Macon and Brunswick Railroad Company*,² is better: "a preliminary injunction of the court, forbidding the State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected the violation, by requiring the restoration of the money thus removed." Certainly, there is no reason why property may not be recovered, on the ground of wrongful

¹ 107 U. S. 711.

² 109 U. S. 446.

possession, if held by the treasurer in the treasury of the State, just as if held by any other officer of the State. Of course, if the money had not been kept separate, but had become mingled with the other moneys in the treasury, it would probably have been no longer traceable on the ground of wrongful possession. So that Chief Justice Waite was right in saying that "no one pretended that if the money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers."¹ In such case, probably the only right of action, aside from suits for damages against the officers, would have been on an implied contract against the beneficiary of the money. Such right of action would be against the State, and not, of course, against the treasurer. As Chief Justice Waite continued: "Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction."

The need which Chief Justice Waite seems to have felt, in *Louisiana v. Jumel*, of explaining *Osborn v. Bank* as not taking money out of the treasury, was not real. *Louisiana v. Jumel* was an entirely different case. The action was not based on the wrongful possession of property belonging to the plaintiffs, but was to recover money which the State owed to the plaintiffs. Plainly, when the State is bound to individuals for money, either by contract or trust, the right of action is against the State alone, and not against the officers in possession of the money. And this is so, whether the money or other property is in the treasury, in the possession of the treasurer, or is in the hands of other officers, entirely separate from the treasury, as in the case of *Murray*

¹ For similar opinion, see *Mich. State Bank v. Hammond*, 1 Doug. (Mich.) 527.

v. Wilson Distilling Company.¹ The same is true of the attempt to enforce a lien against property of the State. The right of action is against the State, not against the officers in possession.²

A case in a State court, *Lowry v. Thompson*,³ is difficult to reconcile. A contract had been made with the land commissioner for the sale of a piece of land to the State of South Carolina. The title deed was placed in the hands of a third party, to be delivered to the land commissioner upon payment of the balance of the purchase money. The land commissioner wrongfully obtained possession of the deed. The office of land commissioner was later abolished, and the effects of the office and the State lands were put into the custody of the secretary of state, under the commissioners of the sinking fund. Suit for the recovery of the deed was brought against the commissioners of the sinking fund, the secretary of state not being made a party, because holding under the commissioners. The court, by two to one, held that the suit could not be maintained, on the ground that the State was an indispensable party to a suit to recover property in its possession. The court urged, it is true, the point that the law provided for control of the commissioners over the secretary of state so far only as he had custody of property of the State. But it is fairly clear from the opinion that the same ruling would have been made in a similar suit against the secretary of state. If so, the decision seems clearly wrong; because the action was for the recovery of property in the wrongful possession of the officers sued.

The great case of *United States v. Lee*⁴ will be given a full exposition, not because it added to the principle set out in this chapter, but because of the careful study and able presentation, both in the opinion of Justice Miller for the five majority justices, and in the opinion of Justice Gray for the four dissenting justices. The case was a suit in

¹ 213 U. S. 151.

² *Christian v. A. & N. C. R.R. Co.*, 133 U. S. 233.

³ 25 S. C. 416.

⁴ 106 U. S. 196.

ejectment against Kaufman and Strong, officers of the United States, in charge of the Arlington estate, the estate of General Robert E. Lee, which had been bid in by the United States at tax sale, and was being used for a soldiers' cemetery, fort and arsenal. The allegation was that the tax sale, and, therefore, the title of the United States, was invalid, as was, in fact, decided in this case. The main question was whether the suit was barred by the interest of the United States in the property. The answer depended upon: (1) precedent; (2) principle, (3) public policy.

"The English authorities, from the earliest to the latest times, show," declared Justice Gray, "that no action can be maintained to recover the title or possession of land held by the crown by its officers or agents, and leave no doubt that in a case like the one before us, the proceedings would be stayed at the suggestion of the attorney general in behalf of the crown." Justice Miller passed by the English authorities, saying that little weight could be given them for two reasons: the existence of an effective remedy by petition of right in England; and the great reverence for the crown, which would make the disturbance of the possession of the crown a shocking matter.

Justice Miller then proceeded to the precedents in the supreme court itself. He relied strongly on the language of Chief Justice Marshall in *United States v. Peters*, that "it certainly can never be alleged that a mere suggestion of title in a State to property in the possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title"; and on the decision in *Osborn v. Bank*, with the repetition of this statement from *United States v. Peters*.

Justice Gray did not succeed satisfactorily in his attempt to explain away these cases.¹ To offset them, he cited "*The Exchange*."² It is true that in that case the court declined to examine the validity of the title set up in de-

¹ See above, p. 56.

² 7 Cranch 116.

fense. But that was a libel of a war-vessel in the regular service of the emperor of France, which had come into our waters on a friendly visit. Under these circumstances, comity required that the judiciary should not interfere with the vessel. The case was not mentioned by Justice Miller; nor, it seems, has it been considered in point in other cases of suits involving property claimed by the state.

Then there were the four previous cases like *United States v. Lee*. One of them, *Meigs v. McClung*,¹ came up between *United States v. Peters* and *Osborn v. Bank*. Of this case, Justice Gray said: "the full statement of their position, in the bill of exceptions, . . . shows that the fact that they so held was not set up in defense, except as supplemental to the position that the legal title was in the United States, and it does not appear to have been mentioned in argument. No objection to the exercise of jurisdiction was made by the defendants or by the United States, or noticed by the court. That the court understood the United States to desire a decision upon the merits is further apparent from Chief Justice Marshall's summary towards the close of the opinion: 'The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence without compensation.' Had the decision covered the question of jurisdiction, the Chief Justice would hardly have omitted to refer to it in *Osborn v. Bank*." This last suggestion is without any weight; for, in *Osborn v. Bank*, Chief Justice Marshall made no resort to precedent, not even to *United States v. Peters*. The statement, moreover, that the interest of the United States was set up only as part of the defense of title in the United States, is clearly incorrect. It is true that the point was not argued in the supreme court, nor mentioned in the opinion. But, as pointed out by Justice Miller, the bill of exceptions clearly set out the interest of the United States as a separate ground of defense.

In the three similar cases—*Wilcox v. Jackson*,² *Brown*

¹ 9 Cranch 11.

² 13 Peters 498.

v. Huger,¹ *Grisar v. McDowell*²—arising after *Osborn v. Bank*, the objection was not raised. Justice Miller regarded this as evidence that the principle was considered as fully established. Justice Gray explained them on the ground that the United States was willing that the court should decide. "The view," he declared, "on which this court appears to have constantly acted, which reconciles all its decisions and is in accord with the English authorities, is this: the objection to the exercise of jurisdiction over the sovereign or his property, in an action in which he is not a party to the record, is in the nature of a personal objection, which, if not suggested by the sovereign, may be presumed not to be intended to be insisted upon." Now, the immunity from suit is a personal privilege, which may be waived. But certainly the court ought not presume a waiver, and require an active insistence upon the privilege, in a suit against individuals, to which the sovereign is not even a party. It ought rather, if facts appear that show the suit to be in violation of the immunity of the sovereign, dismiss the case unless a waiver of the immunity is shown. This is confirmed by the consideration that the law officers of the United States have no power to consent to a suit against the United States;³ yet this view of Justice Gray would make the allowance of suits, in effect against the United States, depend upon whether these law officers might or might not object. Anyway, this view of Justice Gray does not affect the decisions in *United States v. Peters* and *Osborn v. Bank*.

Two recent opinions did furnish him some support. In "The Davis,"⁴ the opinion placed a false emphasis on whether property is in the possession of public officers or not.⁵ And in *Carr v. United States*,⁶ Justice Bradley, delivering the opinion of the court, expressed the opinion

¹ 21 How. 305.

² 6 Wall. 363.

³ See Part I, p. 44, note.

⁴ 10 Wall. 15.

⁵ See above, p. 38.

⁶ 98 U. S. 433.

that cases like *United States v. Lee* are barred by the interest of the United States. But, as pointed out by Justice Miller, this was purely obiter. No doubt it was these two opinions that encouraged the vigorous objection to the action in *United States v. Lee*. On the whole, however, the summary of the cases by Justice Miller was well justified: "This examination of the cases in the court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into the plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period, the court has held the principle to be unsound, and in the class of cases like the present . . . it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well considered decisions."

The argument upon principle was strongly stated by Justice Gray for his side: "The sovereign is not liable to be sued in any judicial tribunal without its consent. The sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through its agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and in its behalf, is to maintain an action to recover possession of the property against the sovereign; and to invade such possession of the agents, is to invade the possession of the sovereign, and to violate the fundamental maxim that the sovereign cannot be sued." "To maintain

this action, independently of any legislation by congress, is to declare that the exemption of the United States from being impleaded without their consent does not embrace lands held by a disputed title."

Justice Miller, in answer to this argument, pointed out that here was upon its face an ordinary action against individuals for the wrongful possession of the plaintiffs' land. The defendants set up in defense an authority; but if that authority was not lawful, it was no authority at all. The objection to the action was, he said, inconsistent with the fifth amendment: "If this constitutional provision is a sufficient authority for the courts to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public uses without just compensation." Certainly, as already pointed out, the fact that the United States can act only through agents should not bar an otherwise proper action against the agents. Moreover, the fact that the officers claimed no personal interest in the land did not, of course, render them less liable for their wrongful possession. It is true that in such cases the court will, if possible to join the parties beneficially interested, require this to be done. But if it cannot be done, the court will enforce the right of action against the agent, to which the principal is not an indispensable party.

Justice Gray also urged the objection of public policy. "It is essential to the common defense and general welfare," he declared, "that the sovereign should not, without its consent, be dispossessed, by judicial process, of forts, arsenals, military posts and ships of war, necessary to guard the national existence against insurrection and invasion; of custom houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships." In answer, Justice Miller pointed out that the United States, as decided in *Carr v. United States*,¹ is not bound by deci-

¹ 98 U. S. 433.

sions against its officers, and may itself bring an action to have its rights determined; or, if satisfied that its title has been shown to be invalid, may secure the property by purchase or by condemnation. Anyway, he said, any evils that might result would be small indeed compared to the alternative evil of allowing private property to be taken without due process of law, and denying recovery upon a mere claim of title in the state.

The decision in *United States v. Lee* has never since been questioned. It was reaffirmed, without dissent, in *Tindal v. Wesley*,¹ a similar action against State officers.² In *Stanley v. Schwalby*,³ Justice Gray, delivering the opinion of the court, considered that the judgment below was directly against the United States, because "in an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be (as it was in this case) for title also." Of course, there is no ground of action against the officers to determine title, because they claim no title. In *Chandler v. Dix*,⁴ where the State had the same relation to the land that the United States had in *United States v. Lee*, the court sustained a decree dismissing a bill to set aside the title of the State, brought against officers merely in possession without claim of title in themselves. In case of a lien upon property, also, the right of action is against those claiming title to the property; there is no ground of action against officers merely in possession—as was held in *Cunningham v. Macon and Brunswick Railroad Company*.⁵

A strong State case, broadly applying the principle set out in this chapter, is *Michigan State Bank v. Hammond*.⁶ The State received an assignment of property, on condition of saving the assignee harmless against certain liabilities.

¹ 167 U. S. 204.

² U. S. v. Lee was also followed in an interesting recent case in Maryland—*Weyler v. Gibson*, 110 Md. 636.

³ 162 U. S. 255.

⁴ 194 U. S. 590.

⁵ 109 U. S. 446.

⁶ 1 Doug. (Mich.) 527.

The property was put in charge of certain State officers for disposal, and for payment of the proceeds into the treasury. The State failed to save harmless the assignee, who thereupon brought a bill in equity against the State officers to have the property applied. The court held that title had reverted to the assignee on breach of the condition subsequent, so that he might have sued for the property in ejectment, trover, or money had and received. Equity would not decree a forfeiture, but would grant relief to the extent of applying the property to fulfil the obligation of the State to pay the liabilities of the assignee.

The broad principle, then, governing suits against public officers for property claimed by the state, is this: the action may be maintained whenever grounded upon alleged wrongful possession of property of the plaintiff. The fact that the defense depends upon the title of the state does not bar the action. The direct interest of the state is not denied; the state may, if it choose, join as party defendant. But the interest of the state does not bar the separate right of action against the officer. The propriety of the suit against the officer depends not upon the interest of the state, but upon the nature of the action.

CHAPTER IV.

MANDAMUS AND ANALOGOUS REMEDY IN EQUITY.

“It has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other.”¹ Or, in the language of Justice Miller: “in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with the plaintiff’s rights in the premises.” A study of what constitutes “a plain official remedy,” such as to open this class of remedies against the officer, is not the purpose here. The examination here is limited to the relation of this class of cases to the immunity of the state from suit.

In performing the duty imposed upon him, the officer acts for the state. The act may be simply the exercise of a governmental function, which the state is under no obligation to perform; or, it may constitute the performance of an obligation of the state to the individual, for which, if the state were suable, he could hold the state. But the right to sue the officer does not arise from the obligation of the state. For instance, the fact that the state is bound by contract to pay certain money to individuals, as in Louis-

¹ Justice Bradley, in *Board of Liq. v. McComb*, 92 U. S. 531.

iana v. Jumel, would not in itself give rise to a right of action against the officer in possession of the money to compel him by mandamus to pay it over.¹ In *Pitcock v. State*,² the superintendent and financial agent of the Arkansas State penitentiary had made a contract, duly approved by the board of commissioners, to supply a manufacturing company with convict labor. An action against the officers to restrain the withdrawal of convicts, and to compel the furnishing of more according to the contract, was held to be in effect a suit against the State, because the obligation of the contract was upon the State, not upon the officers. One of the judges, Wood, took the view that, although the board had discretion in making the contract, yet, when made, they were bound to execute it, just as much as though the legislature had made the contract and ordered the board to carry it out. And it would seem that, where an officer has authority to make a contract, and to execute it in the course of his official functions, a mandate to execute it may properly be implied. At any rate, however, the right of action against the officer arises, not out of the obligation of the state, but out of the new legal relation between him and the individual when a plain official duty is imposed upon him, in the performance of which the individual has a personal interest. Such being the principle, there is no reason why the liability of the officer should be affected by the fact that the act also constitutes the performance of a contract by the state. In *Rolston v. Crittenden*,³ suit to compel action by the governor of Missouri was held not to be a suit against the State, although the act constituted the performance of a contract by the State.

When such a right of action, by mandamus or injunction, exists against an officer, "if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the

¹ Nor may a trust resting upon the state be enforced by a suit against officers.—*Cunningham v. R.R. Co.*, 109 U. S. 446.

² 121 S. W. (Ark. 1909) 742.

³ 120 U. S. 390.

writ."¹ *Woodruff v. Trapnall*² was an action of mandamus to compel the attorney general of the State of Arkansas to accept, in payment of a judgment, notes of the State bank, which the State had promised to receive for all debts due the State; which law had, however, since been repealed. The supreme court held the repealing act unconstitutional, and reversed the judgment of the State court denying the mandamus. No objection was made that the suit was in effect against the State.

In *Board of Liquidation v. McComb*,³ objection was made. The State of Louisiana provided for an issue of \$15,000,000 of consolidated bonds to take over its existing indebtedness, at the rate of sixty cents on the dollar, the new bonds to be secured by a certain tax and by other special provisions. The duty of making the exchange was imposed on a board of liquidation, composed of the governor and other State officers. The act provided that the power of the judiciary, by means of mandamus, injunction, and criminal proceedings, should be exerted to compel the carrying out of the provisions of the act. Most of the creditors accepted the offer of the State. A later act provided that a claim of the Louisiana Levee Company against the State might be exchanged at par for consolidated bonds. This suit was by holders of such bonds to restrain the board from issuing the bonds for the claim in full. The supreme court held that it was part of the consideration of the contract with the bondholders that the new bonds should be issued only at sixty cents on the dollar; that, therefore, the act providing for exchange at par was unconstitutional, and could afford no justification to the board for the non-performance or violation of its plain official duty under the original act.

*Louisiana v. Jumel*⁴ arose over the same issue of bonds. The act authorizing the issue provided for a certain tax to pay the interest, and the surplus to buy up the principal:

¹Justice Bradley, in *Bd. of Liq. v. McComb*.

²10 How. 190.

³92 U. S. 531.

⁴107 U. S. 711.

"The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period; and this levy shall authorize and make it the duty of the auditor and treasurer and the said board respectively, to collect said tax annually and pay said interest and redeem said bonds until the same shall be fully discharged." And a constitutional amendment, sanctioning the issue, provided: "to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected, each and every year, until the said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds, . . . and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the treasury."

In 1880, a new constitution was adopted which provided, in what was called the "debt ordinance," that the coupons falling due January 1, 1880, should be remitted, and the interest taxes collected to meet said coupons transferred to defray the expenses of the State government, and for a large reduction of interest on subsequent coupons, and the discontinuance of the special tax. Holders of consolidated bonds brought suit in the United States circuit court against the auditor and treasurer, and other officers composing the board of liquidation, "that the defendants and each of them may be adjudged to replace and re-instate to the credit of said interest fund any money or funds that may have been diverted therefrom, . . . and that said defendants and each of them may be peremptorily enjoined and restrained from recognizing as valid against your orators, article 208 of the constitution of Louisiana, and the debt ordinance." At the same time, an action of mandamus was begun in the State court, and removed to the United

States circuit court, against the same officers, to compel them to apply all moneys levied and fixed by the act of 1874 to the purposes of that act, and to proceed to collect the tax fixed and levied by the act of 1874, and apply the moneys thereby realized to the purposes of the act. The two cases were decided together by the supreme court. The court did not deny that the promises and pledges of the funding act and constitution of 1874 were part of the contract of the State, and that the constitution of 1880 and the debt ordinance, so far as in violation, were unconstitutional. But it held that the suits were in effect against the State, and could not be maintained.

Chief Justice Waite delivered the opinion of the court. A large part of the opinion was devoted to showing that the officers concerned were not made trustees for the bondholders in respect to the collection of the tax and the disbursement of the proceeds, but that the money came into the treasury and was disbursed just like other taxes. Board of Liquidation v. McComb he explained upon the ground that "the board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust, and might act accordingly." This explanation shows that the chief justice did not properly appreciate the nature of the relief asked in that case and in the present case. If there was any trust in that case, it was in the State, and of course not enforceable as such in an action against the officers. There was no pretense of any absolute vesting of the bonds in the board in trust; and the relief was not granted upon that ground. So, in the present case, the action against the officers was not based on any idea of a trust in them. Yet the whole opinion is colored with the idea that this was an attempt to compel, through the officers, the performance of the obligations of the State. Properly viewed, the action was based, not on the obligation of the State, but on the "plain official duty" imposed on the officers.

Were the duties imposed on the officers by the funding

act and constitutional amendment of 1874, considered apart from the later enactments, such as to be judicially enforceable against them as such? Chief Justice Waite laid stress on the extensive nature of the relief asked: "The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. . . . But the simple question presented is whether a single bondholder or a committee of bondholders can, by the judicial writ of mandamus, compel the executive officers of the State to perform generally their several duties under the law. . . . Our attention has been called to no case in the State courts of Louisiana in which such general relief has been afforded. . . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place." And, in *Cunningham v. Macon and Brunswick Railroad Company*,¹ Justice Miller explained *Louisiana v. Jumel* upon the ground that, in this class of cases, the duty of the officer must be "a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government," and that *Board of Liquidation v. McComb* was as far as the court was willing to go in this direction. The reason for the judgment in *Louisiana v. Jumel* he declared to be that "there was no jurisdiction in the circuit court, either by mandamus at law or by a decree in chancery, to take charge of the treasury of the State, and, seizing the hands of the auditor and

¹ 109 U. S. 446.

treasurer, to make distribution of the funds found in the treasury in the manner in which the court might think just."

It is certainly true that the jurisprudence of the supreme court has tended to limit the remedy of mandamus to specific, ministerial acts, not requiring the exercise of judgment; whereas the State courts have shown a tendency to broaden the remedy to all acts that are mandatory, not left to the discretion of the officers. For instance, Justice Field took it for granted that mandamus will lie against the treasurer to compel payment of appropriations for salaries; and such is the general ruling in the State courts. But, although Chief Justice Waite impliedly recognized that a creditor of the State may compel the performance of "that specific duty" by "an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over," it was held, in *United States v. Guthrie*,¹ that mandamus will not lie to compel the secretary of the treasury of the United States to pay an appropriation for a salary in the regular course of his duties. In that case, it is true, the officer had been removed, illegally as alleged, by the president; and the occurrence of Justice Curtis was upon the ground that title to the office must be settled first; and Justices Campbell and Grier also concurred specially, though not expressing their grounds. But, as Justice McLean contended in his vigorous dissenting opinion, if the duty was ministerial, the illegal removal by the president would not alter the case. And the opinion of the court seems to be based on the broad ground that the judiciary will not interfere with the administration of the executive departments.

On the other hand, Justices Field and Harlan, dissenting in *Louisiana v. Jumel*, considered that "if the new constitution had never been adopted, there could be no question as to the power of the State court to require that the moneys collected should be applied to the payment of the interest." Undeniably, there were definite funds in the treasury, which it was the plain duty of the officers to apply to a definite

¹ 17 How. 284.

purpose—the payment of the coupons due January 1, 1880. Justice Harlan said: “It is apparently urged, as an obstacle in the way of relief, that plaintiffs do not seek to have the proceeds of these taxes applied specially to the payment of their claims, but ask such orders as will enable all holders of consolidated bonds to participate in the distribution of the moneys raised under the statute and constitution of 1874. . . . If the relief asked cannot be given for the benefit of all holders of consolidated bonds, there would seem to be no difficulty in restricting payments to such as are actually before the court. . . . It is, however, proper to say that, notwithstanding the criticisms made by the court upon the nature and extent of the relief asked, I do not feel authorized to infer from its opinion that relief would be given to the parties before it, had they asked payment of their coupons only.” Any idea that individual bondholders could not obtain relief because the acts complained of did not concern them only, but were in the general administration of an act, is, of course, refuted by *Board of Liquidation v. McComb*. And the distinction between duties specially imposed upon officers, and duties in the regular exercise of their offices, has been finally disposed of by *Ex parte Young*.¹

The relief here should have been granted if sustainable upon the jurisprudence of Louisiana.² Chief Justice Waite said: “Our attention has been called to no case in the state courts of Louisiana in which such general relief has been afforded.” And, indeed, in *State ex rel. Hart v. Burke*,³ in a case exactly like the present action for mandamus, relief was denied. But that decision was clearly put, not upon the extensive nature of the relief asked, but upon the repealing State constitution and debt ordinance. Justice Field said: “There can be no doubt that, but for the debt ordinance . . . , a mandamus or other compulsory process could

¹ 209 U. S. 123.

² That is, apart from the question, which was not decided, whether the power of the United States circuit court to issue mandamus as an original writ was secured by the removal from the State court.

³ 33 La. Ann. 498.

have been issued by the courts of Louisiana to compel officers of the State . . . to execute the provisions of the act of 1874 and of the constitutional amendment of that year." And Justice Harlan said of *State ex rel. Hart v. Burke*: "It is, I think, clear that, but for the debt ordinance, the court would have sustained the writ in that case." That he did not misinterpret that case, he said, was clear from the subsequent case of *State ex rel. Newman v. Burke*,¹ in which was granted a mandamus against the treasurer, auditor, and fiscal agent to compel the execution of their duties under the debt ordinance, by the transfer on the books of the money collected for taxes for the payment of the coupons due January 1, 1880, to the general fund, and for the payment of warrants on the general funds held by the relator.

If the action were otherwise maintainable, what was the effect of the debt ordinance? In *State ex rel. Hart v. Burke*, it was said: "We are aware of no principle which excepts the relation of states to their constituted official agents from the general rule of revocability which applies to all other mandates." And in *Louisiana v. Jumel*: "As against everything except the outstanding bonds and coupons, the constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract." Does this mean that, although the debt ordinance was invalid as violating the pledge of the State to collect the tax and pay the coupons, yet, so far as it altered the duties of the particular officers, it was valid? If so, it is directly contrary to the opinion in *Board of Liquidation v. McComb*. Certainly, it would seem that it was part of the contract that the tax should be collected and the proceeds paid as provided in the original act; and it will be assumed here that the termination of the duties of the officers was unconstitutional.²

¹ 35 La. Ann. 185.

² Of course, if the office were abolished, even if the law abolishing it were held unconstitutional the court could grant no relief, since it could not keep the office filled—that is political.

The decision in *State ex rel. Hart v. Burke* was placed upon this ground: that the court had no power to declare a provision of the State constitution unconstitutional, except in a case over which it had jurisdiction; that a suit to enforce the performance of any contract or obligation of the State against its will was a suit against the State, over which the court had no jurisdiction; that, although a State statute contrary to the State constitution might be held not to express the will of the State, yet a provision of the State constitution might not—"The effect of the federal constitution is not to deprive the State of the power of volition, but simply to restrain the operation and execution of her will, so far, and so far only, as it conflicts with that instrument." This involves the constitutional heresy that the operation of the federal constitution upon a State enactment is different from the operation of a State constitution upon a State statute. Yet the opinion of Chief Justice Waite is full of the same idea: "The question, then, is whether the contract can be enforced, notwithstanding the constitution, by coercing the agents and instrumentalities of the State, whose authority has been withdrawn in violation of the contract, without having the State itself in its political capacity a party to the proceedings. The relief asked will require the officers against whom the process goes to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do." Such language justified the vehement protest of the dissenting justices, who regarded the decision as placed upon that ground.¹

An explanation less gross may be found in views presented in opinions in other cases. Justice Matthews, with whom agreed three other justices, in *Antoni v. Greenhow*,² based his concurrence on the ground that "a suit to compel

¹ Chief Justice Waite did, in fact, in *Rolston v. Crittenden*, 120 U. S. 390, squarely explain *Louisiana v. Jumel* on the ground that "There the effort was to compel a State officer to do what a statute prohibited him from doing."

² 107 U. S. 769.

the officers of a State to do the acts which constitute a performance of its contract by the State, is a suit against the State itself," maintainable only so long as the State allows it. And this view was adopted by Justice Bradley, speaking for the four dissenting justices, in *Poindexter v. Greenhow*.¹

Another statement of much the same position is that by Justice Lamar in *Pennoyer v. McConnaughy*.² He divided cases against State officers into two classes: "The first class is where the suit is brought against the officers of the State as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contract. . . . The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." In other words, an officer may not be judicially controlled when, in acting, he will be acting for the State; but, in acting under color of an unconstitutional authority, he is not acting for the State, and is liable to suit.

Both these views—of Justice Matthews and of Justice Lamar—are out of harmony with the opinion in *Board of Liquidation v. McComb*—that "it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; . . . if the officer plead the authority of an unconstitutional law . . . , it will not prevent the issuing of the writ." Justice Bradley, who wrote this opinion, did not mention it in *Poindexter v. Greenhow*, but seemed inclined to class the case with *Davis v. Gray* as a case of "State aggression on the rights of individuals,"³

¹ 114 U. S. 270.

² 140 U. S. 1. The same idea was more or less worked out by Justice Matthews in *Ex parte Ayers*, 123 U. S. 443.

³ See below, p. 88.

adding that "these cases approach nearer to suits against a State than any others which have received the sanction of this court." But the principle stated in the McComb case has been restated with approval many times, and has never been challenged. Justice Matthews did not mention the case in *Antoni v. Greenhow* or in *Hagood v. Southern*.¹ In *Ex parte Ayers*, he simply said, quoting from the McComb case, without any attempt to harmonize, that the view stated by him did not "forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." Justice Lamar evidently did not know just what to do with the case, as appears from the irrelevant way he inserted it. After pointing out his second class of cases, "where a suit is brought against defendants who, claiming to act as officers of the State and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of plaintiff acquired under a contract with the State," he continued: "Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the eleventh amendment, an action against the State," citing, among other cases, the McComb case.

Aside from the inconsistency with the McComb case, which a formal approval of the doctrine in that case of course does not cure, the whole position is based upon the idea, the error of which was pointed out at the beginning of the chapter, that the nature of the action of mandamus is changed by the fact that the "plain official duty" to be performed is an act "which constitutes a performance of

¹ 117 U. S. 52.

its contract by the state.”¹ A state may, of course, provide for such action against officers as a form of action against itself. But the fact that the state extends the remedy where it would not exist by ordinary practice does not necessarily make it a form of action against the state. That should be determined by the nature and purpose of the remedy. In *Louisiana v. Jumel*, for instance, it seems clear that the remedy was given not as a means of compelling the State to live up to its obligations—there was no idea that the State would do otherwise,—but as a means given by the State to the creditors of compelling the proper exercise of their duties by the State officers. At any rate, where the remedy is not by special grant, but simply the result of the imposition of such duties as by the general law of the state are enforceable by mandamus, there is not the slightest ground for regarding the action as a suit against the state. If the action is maintainable, upon the jurisprudence which governs the case, as a suit against the officers as such, any further distinction is arbitrary and out of place.²

The only ground, then, consistent with sound constitutional principle, upon which *Louisiana v. Jumel* may be based is that upon which Justice Miller rested it in his analysis of the cases in *Cunningham v. Macon* and *Brunswick Railroad Company*—namely, that the nature of the relief was beyond the scope of mandamus. And that was probably wrong upon the jurisprudence of Louisiana, which should have governed.

¹ It involves, also, two propositions which have been opposed in other parts of this paper: that consent of a State may give jurisdiction in cases coming within the prohibition of the eleventh amendment (see Part I, p. 29); and that withdrawal of a remedy against the State, though made part of a contract, is not unconstitutional (see Part I, p. 36).

² In *Antoni v. Greenhow*—approved by Justice Lamar in *Penoyer v. McConaughy*.—Justice Matthews and the three justices who agreed with him even held to be a suit against the State, mandamus to compel the “purely ministerial duty” of receiving coupons for taxes, thus running squarely counter to the *McComb* case. In *Antoni v. Greenhow*, the remedy to compel acceptance of the coupons existed, not by special grant, but simply, as the State court had held, under the general law as to mandamus.

The decision seems unfortunate in its whole bearing. It prevents a State from offering to creditors an inviolable guarantee of the fulfilment of its contract. Moreover, it is impossible to determine its real scope—where the line between it and *Board of Liquidation v. McComb* is to be drawn. *Louisiana v. Jumel* has, however, been squarely reaffirmed in *Hagood v. Southern*,¹ Justices Field and Harlan still dissenting, and again in *Louisiana v. Steele*.²

¹ 117 U. S. 52.

² 134 U. S. 230. In *Neganab v. Hitchcock*, 202 U. S. 473, also, in which it was held, very properly, that the action against the secretary of the interior could not be maintained to enforce the execution of a trust resting on the United States, the court passed over the question whether the action might be maintained to compel the execution of the act of 1889 as a plain official duty—"whether the courts would have power to control the action of the secretary of the interior in this matter, or whether the power and authority so to do is purely political." The relief asked was, however, clearly beyond the scope of judicial enforcement upon the jurisprudence of the courts of the United States. A decision in a State court, in line with *Louisiana v. Jumel*, is *Board of Public Works v. Gantt*, 76 Va. 455, decided by three judges against two. *Contra*, *State v. Cardoza*, 8 S. C. 71.

CHAPTER V.

EXTENSION OF THE PRINCIPLE OF EQUITABLE RELIEF AGAINST WRONGFUL ACTS.

In Chapter II was set out the principle of *Osborn v. Bank*—that a public officer may be enjoined, if equitable grounds exist, from committing a tort under color of an unconstitutional authority. The supreme court, as it was composed through the time of the Virginia coupon cases, was not inclined to extend the principle beyond acts for which the officers would be liable in tort.¹ Justice Miller, in his analysis of the cases in *Cunningham v. Macon and Brunswick Railroad Company*, plainly had no thought of extending the principle. He balked at *Davis v. Gray*. He did not include it in his second class of cases—"where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted upon the orders of the government"; but put it where it did not belong, in the third class²—where a plain official duty is imposed upon an officer, which he is about to violate. His doubt of the correctness of that decision is manifest in his comment upon it: "it is clear that, in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further." That Justice Matthews shared this doubt is indicated by his failure to comment on the decision in his exhaustive opinion in *Ex parte Ayers*. He stated the principle governing cases of injuries by public officers thus: "The action has been sustained only in those instances where the act complained of,

¹ The composition was practically the same through the great line of cases from *U. S. v. Lee*, 106 U. S. 196, to *Ex parte Ayers*, 123 U. S. 443.

² The class of cases treated in Chapter IV.

considered apart from the official authority alleged as justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."

*Davis v. Gray*¹ stood, however, decided. In that case, the State of Texas had made land grants in aid of a railroad company; the legal title was not yet conveyed. A later statute declared the grant forfeited, and opened the land to patent by the governor and land commissioner. The receiver of the railroad brought a bill in the United States court to enjoin these officers from "interference with or infringement of the land grant." The court held the later statute unconstitutional, and granted the relief on the equitable ground of preventing such a cloud on the title of the company, and of avoiding the great trouble and expense of actions against the individuals who might receive patents under the unconstitutional statute.²

Justice Swayne, who delivered the opinion of the court, said that *Osborn v. Bank* decided three things: "(1) A circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the plaintiff. (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers in all respects as if the State were a party to the record." The statement that "the court may proceed to decree

¹ 16 Wall. 203.

² Justice Davis, with whom agreed Chief Justice Chase, dissented on the ground that the suit was in effect against the State. The position of the Chief Justice was consistent with his opinion in *Miss. v. Johnson*, 4 Wall. 475, in which he placed the decision on the ground that the executive should not be interfered with in the execution of statutes, although alleged to be unconstitutional. It may be said that this opinion was entirely disregarded in *Ga. v. Stanton*, 6 Wall. 50, in which Justice Nelson put the decision on the ground that the rights for which the State claimed protection were purely political.

against the officers in all respects as if the State were a party to the record," taken by itself, is of course too sweeping. It was criticized in both the majority and minority opinions in *United States v. Lee*. But limited, as it seems to have been intended, to the class of cases mentioned in (1), it probably is not erroneous. The principle stated in (1) has become fully established. *Osborn v. Bank* is not, however, authority for it. It is true that in that case, in addition to the decree for restitution, the decree of the circuit court against the execution of the unconstitutional statute levying the tax was sustained.¹ But the only mode threatened of executing that statute was by distraint for the taxes under the warrant of the State auditor. So that Justice Matthews was justified in saying: "There is nothing, therefore, in the judgment in that cause as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of congress chartering the bank, which consisted of the unlawful seizure and detention of its property."

Davis v. Gray clearly went beyond the principle propounded by Justice Matthews in *Ex parte Ayers*. The acts of the officers complained of—the issue of patents in the name of the State for land within the land grant of the railroad—were not wrongs as "the personal acts of the individual defendants," "considered apart from the official authority alleged as justification," but only as actions in their official capacity. If actions against public officers were to be limited, the distinction of Justice Matthews was clear and reasonable. But does not the principle, although not the authority of *Osborn v. Bank* extend further? The injury in that case would have been a tort on the part of any individual, apart from any official character. But even there the ground for equitable relief rested on the nature of the act in the light of the "official authority alleged as

¹ See 1 *Harv. L. Rev.* 223—D. H. Chamberlain, for this part of the case, adduced by counsel in argument in the Virginia coupon cases.

justification."¹ An officer is separately liable for an injury. The fact that the injury is such as he could not inflict as an individual, but only by the exercise of his office, should not affect the case. The principle logically extends to any violation of a right of person or property under color of an unconstitutional authority.

Any chance that the conservative tendency of the court might prevail was defeated by the fact that the next case, *Pennoyer v. McConnaughy*,² was on all fours with *Davis v. Gray*.³ Justice Lamar propounded a broad principle to determine whether suits against public officers are suits against the State: "where the suit is brought against the officers of the State, as representing the State's action and liability"—that is, where, in performing the acts sought to be controlled, the officers will be acting for the State,—the suit is in effect against the State; but "where a suit is brought against defendants who, claiming to act as officers of the State and under the authority of an unconstitutional statute"—in which case they are not acting for the State,— "commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State," the suit is not against the State. Justice Lamar, in this opinion, pushed the distinction between affirmative relief as not available, and preventive relief as available, entirely too far. But, so far as regards the class of cases now under consideration, the criterion he stated is a proper one: it sustains the principle of relief against injuries in its full scope. Even if his view be accepted, however, that, in acting under an unconstitutional statute, officers are not acting for the State, it does not give the reason why a suit against the officers is not a suit against the State. For the statute cannot be held unconstitutional except in the exercise of jurisdiction; and if the statute be found valid, in which case the officer is acting for the State, then, in his view, the court has exercised jurisdiction in a suit against the State.

¹ See above, p. 48.

140 U. S. 1.

Another similar case is *Preston v. Walsh*, 10 Fed. 315. See also *State Bd. of Land Com. v. Carpenter*, 16 Col. App. 436.

The proper ground for the action against the officers is that a wrongful act is alleged against them, and that the court has jurisdiction to inquire into the authority they set up in justification.

A case that at first sight appears contrary to *Davis v. Gray* is *Oregon v. Hitchcock*.¹ Congress had granted to the State of Oregon swamp lands on public domain within the State. Later, an act of congress provided for the transfer by the Indians on a reservation of their right of occupancy to the United States, and for allotting and patenting the land in severalty to the Indians. The State claimed that the grant to it included swamp lands within the reservation, which vested upon the extinction of the Indian right of occupancy; and brought suit to restrain the secretary of the interior and the commissioner of the general land office from allotting and patenting under the act any swamp lands. Now, such a grant of swamp lands was not complete until identification. Hence the lands were still within the administration of the land department; and one ground for dismissal was the settled policy of the court not to interfere in the administration of the public lands, but to require all claims to be presented before the land department until final action there.²

But the court also held the suit to be in effect against the United States. Justice Brewer quoted from his opinion in *Minnesota v. Hitchcock*:³ "Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in effect it will operate, and the officers have no pecuniary interest in the matter."

¹ 202 U. S. 60.

² *Mich. Land & Lumber Co., v. Rust* 168 U. S. 589; *Brown v. Hitchcock*, 173 U. S. 473; *Humbird v. Avery*, 195 U. S. 480.

³ 185 U. S. 373.

Now, this was a good reason for holding, in *Minnesota v. Hitchcock*, that the suit could be a form of action provided against the United States with the consent of the United States. But this did not prevent a similar action from being maintainable as a suit against the officers, in the absence of consent of the United States. The language of Justice Brewer is just as applicable to *Davis v. Gray*, upon which the argument of counsel was based. The State claimed a vested *jus in rem* in the lands, and sought to restrain the violation thereof by the officers. It is true the contention of the State was wrong; but that could be determined only in the exercise of jurisdiction. The opinion neither in *Minnesota v. Hitchcock* nor in *Oregon v. Hitchcock* mentioned *Davis v. Gray*. It is fair to assume that the court had no intention of impairing the principle of that case.¹

In *Budd v. Houston*,² the principle was extended to grant corrective relief. A suit was sustained against the recorder of mortgages, tax collector, and recorder of conveyances, to remove a cloud on title caused by the registry of a void assessment by the recorder of mortgages, by the illegal tax sale to the State, and by the threatened registry of the title of the State, and to review these illegal tax proceedings and acts of the several officers. The case, to use a phrase of Justice Miller, "goes to the verge of sound doctrine." A bill to quiet title as against a disputed title in the State may not, of course, be maintained against the officers. But specific acts of officers which have caused a cloud on title may, perhaps, be corrected, just as well as they might have been restrained.

In the matter of taxation, the principle warrants the

¹ In *Noble v. Union Riv. Logging R. R. Co.*, 147 U. S. 165, was sustained a decree enjoining the secretary of the interior and the commissioner of the general land office from executing an order revoking the approval of the company's maps for a right of way over the public land, and from molesting the company in the enjoyment of said right of way, which was held to have vested upon the approval by the secretary of the interior of the right of way selected under a grant by congress.

² 36 La. Ann. 959.

restraint, not only of the actual collection of an unconstitutional tax, but also of the proceedings leading thereto. In *Re Tyler*,¹ the court enjoined the levy for a tax alleged to have been over-assessed, as well as the collection thereof. In *Fargo v. Hart*,² the auditor of Indiana was restrained from certifying to the auditors of the several counties an assessment on a railroad, which constituted an unconstitutional interference with interstate commerce. These acts, of course, were not possible to the defendants as private individuals, but only in their official capacity. They were, however, part of the proceedings in a threatened wrong, and as such enjoinable.

The great field for application of the principle has been in the matter of rate regulation by the States. To enforce upon a railroad rates that are unconstitutional is a wrong. And all manner of means of enforcing such rates have been enjoined—the publication of the rates, the hearing of complaints for violation of them, the bringing of suits to enforce them.³

It must not be supposed, however, that every act of an officer under color of an unconstitutional authority may be enjoined. The act must be such as to involve the separate liability of the officer. But the remedy for a breach of contract or violation of a trust is only against the party contractant or the trustee, not against the agent. So that, if the act is only a breach of a contract or trust of the state, there is no right of action against the officer.⁴ Thus, in *Louisiana v. Jumel*, the diversion of the moneys pledged for the coupons was a violation of a right of plaintiffs only so far as it was a breach of contract of the State. In *Neganab v. Hitchcock*,⁵ the acts sought to be restrained violated rights of plaintiffs only as breaches of the trust resting upon the United States. The fact that the act constitutes a breach of contract or of trust on the part of the state

¹ 149 U. S. 164.

² 193 U. S. 490.

³ This means—by suits—is reserved for special treatment in Chap. VI.

⁴ See Justice Matthews, in *Ex parte Ayers*, 123 U. S. 443.

⁵ 207 U. S. 473.

does not, of course, exclude liability on the part of the officer. But there must be something more to involve such liability; there must be a violation of a *jus in rem*. The right of action against the officer is based upon this ground: an act that is a wrong in itself, unless made lawful. For instance, the enforcement of rates upon a railroad is an unlawful interference with the railroad, unless made lawful; and if the rates are confiscatory, they cannot be made lawful. That what prevents the act from being made lawful is the fact that it constitutes an unconstitutional breach of contract on the part of the State, does not affect the case. The collection of a tax, for instance, is an unlawful interference with property rights, unless the tax is lawful. It may be prevented from being lawful by reason of a contract exemption granted by the State.

The distinction is well illustrated in the case of *Pitcock v. State*.¹ The superintendent and financial agent of the Arkansas State penitentiary, in the exercise of their powers, and with the approval of the board of commissioners, made a contract in the name of the State to supply a certain manufacturing company with convict labor. Suit was brought to restrain the withdrawal of the convicts in violation of the contract, and to compel the furnishing of more to make up the amount of labor under the contract. A restraining order was granted; and on violation thereof, judgment for contempt. The judgment was reversed by the court above on the ground that "a withdrawal of the convicts from the premises of plaintiffs was not a taking of or a trespass upon the latter's property. It was only a refusal to perform the alleged contract which plaintiffs seek to restrain." That is, the withdrawal was not a wrong in itself unless supported by lawful authority, but was only a breach of the contract of the State.

Board of Liquidation v. McComb has been classed with *Davis v. Gray*.² And probably it may be based on the same

¹ 121 S. W. (Ark. 1909) 742.

² By Justice Bradley, it seems, in *Poindexter v. Greenhow*. And by Judge Billings in *Chaffraix v. Bd.*, 11 Fed. 638. For the ground of the decision in the *McComb* case, see Chap. IV.

principle. For in the McComb case the plaintiffs were holders of consolidated bonds; and the action might be regarded as to restrain "the board from injuriously affecting their value, by issuing similar bonds to parties not entitled thereto." The threatened acts were not only breaches of contract, but violations of property rights. Similarly, where a State grants an exclusive franchise, the grantee acquires not merely a contract right, but a *jus in rem*, which he may protect against infringement by individuals or by public officers in the name of the State.

To conclude, then, the principle of *Osborn v. Bank* has been extended in *Davis v. Gray* and the subsequent cases. The broad principle is this: public officers may be restrained whenever, under color of unconstitutional authority, they are proceeding to violate rights in *rem*.¹

¹ That the official position of the officers sued is taken into account appears strongly in the ruling that the successors in office of the officers enjoined are privies to the decree. *Prout v. Starr*, 188 U. S. 537; *Gunter v. Atl. Coast Line R. R. Co.*, 200 U. S. 273. The successor in office may not be substituted, however, pending hearing on appeal or writ of error. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28. See also *Chandler v. Dix*, 194 U. S. 590.

CHAPTER VI.

EX PARTE YOUNG.

One means of enforcing laws is by suits—criminal, or by way of mandamus or injunction. In *Ex parte Young*,¹ the question was squarely presented whether the law officers of a State may be restrained from bringing suits in the name of the State for the enforcement of a statute fixing railroad rates, alleged to be confiscatory, and therefore unconstitutional.²

To clear the discussion, several points may be quickly disposed of. In the first place, no regard will be given to the suggestion³ that the scope of the eleventh amendment might be limited in relation to the later fourteenth amendment. It has not been used in any decision;⁴ and there seems not the slightest ground for it. Nor will the view of Justice Brewer be further noticed—that the interest of the state in the enforcement of its laws is only a governmental interest, and that such an interest is not sufficient to constitute the state party to a suit.⁵ Moreover, the fallacy in the idea⁶ that the suit is not against the State because the officer is not acting for the State if the law is unconstitutional, has been exposed. As pointed out, the State has

¹ 209 U. S. 123.

² Another ground of unconstitutionality was the fact that the penalties were so enormous as to show a design to scare the railroads from testing the constitutionality of the rates. This, of course, was only an additional ground of unconstitutionality, and would not make the suit against the officers any less a suit against the State.

³ By Justice Shiras, in *Prout v. Starr*, 188 U. S. 537.

⁴ Justice Peckham, in *Ex parte Young*, assumed that the eleventh amendment retained full effect; although he honored the contrary suggestion so far as to say of the fourteenth amendment: "but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment."

⁵ This view has been sufficiently disposed of in Part I, p. 42.

⁶ Stated even by Justice Peckham in *Ex parte Young*.

an interest in whether the acts of its officers are lawful; and, anyhow, the question of constitutionality can be decided only in the exercise of jurisdiction, so that, if the law is found constitutional, the court will have exercised jurisdiction over a suit against the State. On the other hand, as has been several times stated, the fact that the state can act only through agents does not make a suit against the agents a suit against the state. Also, the fact that the officers have no personal interest in the controversy makes no difference.

The question whether, supposing the suit to be otherwise well brought, grounds for equitable relief exist, is incidental. It will be accepted here that the maxim that "equity has no jurisdiction to enjoin criminal proceedings" means only that in general no equitable grounds exist; but where there are special equitable grounds, the maxim does not apply. In such a matter as the fixing of rates, where penalties are provided for each violation, clearly there are equitable grounds. "The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community, as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."¹ On the other hand, where the enforcement is to be simply by application for mandamus or mandatory injunction to compel obedience, it would seem just as clear that the remedy by defense to such suit is adequate. If, however, criminal proceedings are enjoined, it may be proper to enjoin also any other action in which the same issues would be involved.²

¹ Justice Harlan, in *Smyth v. Ames*, 169 U. S. 466, 518. Justice Peckham, in *Ex parte Young*, also stated strongly the equitable grounds.

² In *Ex parte Young*, where the only suit that the attorney gen-

In the earlier rate cases, where the enforcement of rates was entrusted to railroad commissions, no special point was made of the restraint of suits in actions to enjoin generally the enforcement of rates by the commissions. In *Prout v. Starr*, Justice Shiras took the view that, the court having jurisdiction to enjoin the board of transportation from enforcing the rates, the injunction properly extended to enjoin suits to enforce such rates, on the ground that such suits would be an attempt by a party to the suit in the federal court to impair the jurisdiction of the federal court, by bringing suit involving the same questions in the State courts. "It is true," he declared, "that the defendant was included in the bill as attorney general of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the valid criminal laws of the State, but its object is to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void." Justice Peckham, in *Ex parte Young*, stated the same view: "When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction to the exclusion of all other courts, until its duty is finally performed." This view of enjoining such suits, namely, that it is incidental to the exercise of jurisdiction, and necessary to make the jurisdiction of the federal court effective, avoids conflict with section 720 of the revised statutes, forbidding the

eral, *Young*, could bring, was by formal action in the name of the State for mandamus, criminal proceedings by the prosecuting attorneys of the State were also enjoined. Anyhow, the question of equitable ground probably did not arise in that case, since the case did not come up on appeal in the injunction suit, but on petition for habeas corpus upon sentence for contempt for violation of the injunction.

granting of a writ by any court of the United States to stay proceedings in any court of a State.¹

Even where the suits are to be brought in the name of the commission, however, I think that this doctrine of perfecting jurisdiction, by enjoining parties to the action from bringing other suits involving the same question, does not properly apply. The suits, though in the name of the commission, are merely forms of action by the State.² But, the State not being a party to the original suit, suits by the State cannot be enjoined; and the fact that the act has been declared unconstitutional does not make the suit to enforce it any less a suit by the State, any more than in any other case the suit is any less a suit by the plaintiff because his ground of action is not well-founded.³ The point is still clearer where the suits are to be brought in the name of the State by the attorney general, who, although a member of the commission, brings the suit not in that capacity, but in his entirely distinct capacity as attorney general. At any rate, whatever view be taken of the cases where the officer has other connection with the enforcement of the rates, the doctrine of incidental jurisdiction certainly has no place where, as in the suit from which *Ex parte Young* arose, the suits are to be brought by the law officers of the State, who have no relation whatever to the enforcement of rates, except to bring suit in the name of the State.

The enjoining of suits in the name of the State to enforce rates can properly be sustained, then, only upon the ground that such suits are simply part of the proceedings to violate the rights of the plaintiff under color of an authority alleged to be unconstitutional. That is, such suits may be,

¹ The doctrine of *Dietzsch v. Huidekoper*, 103 U. S. 494.

² See Part I, p. 41.

³ No special point was made of the enjoining of suits, in such actions to enjoin enforcement by commissions, so recently as *McNeill v. So. Pac. Ry. Co.*, 202 U. S. 543, and *Miss. R. R. Com. v. Ill. Cent. R. R. Co.*, 203 U. S. 335. In the latter case, the order of the commission was enforceable only by application to court for a mandamus or mandatory injunction; so that there was no ground for equitable relief. This point, however, seems not to have been raised.

by their connection, in themselves wrongful acts, from which the agents of the State may be restrained just as they may from other wrongful acts. Justice Brown first gave expression to this idea, in *Davis and Farnum Manufacturing Company v. Los Angeles*:¹ "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding." It was adopted in *Ex parte Young*. Justice Peckham said, with respect to the *Reagan* and *Smyth* cases: "In those cases, the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates. . . . The threat to commence those suits under such circumstances was, therefore, necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer."

Is this a proper view of such suits, as equivalent to any other threatened act, part of the execution of an unconstitutional statute? Or is a suit to be regarded simply as a resort to judicial determination whether the statute is to be enforced? There were precedents—some to comfort, some to plague the court.²

The main reliance of Justice Peckham, in the opinion of the court, was upon *Reagan v. Farmers' Loan and Trust*

¹189 U. S. 207.

²The point decided in *Ex parte Young*—whether suits in the name of the State by law officers having no other relation to the statutes in question might be enjoined—was raised in two earlier cases, but avoided by basing the decisions on other grounds. In *Cotting v. Godard*, 183 U. S. 79, the objection on this score was not raised by the attorney general at the proper stage of the case; and the court took this as an opportunity not to decide the case, but to dismiss as to the attorney general, without prejudice to a new suit. In *Gunter v. Atl. Coast Line R. R. Co.*, 200 U. S. 273, a bill to restrain suit by the attorney general to recover back taxes was sustained as ancillary to a previous action, involving the validity of the same taxes, to which the State had been a party.

Company¹ and *Smyth v. Ames*.² It is true that in both those cases the attorney general was a member of the railroad commission; and that no special point was made as to the enjoining of suits in the general injunction against enforcement of the rates. However, if such suits be regarded as part of the execution of the unconstitutional rates, Justice Peckham was clearly right in holding that it makes no difference whether the officer has a special relation to the statute, or whether his duties are simply in the regular exercise of his office. "The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State." Justice Harlan himself, in his dissenting opinion, abandoned the distinction in *Fitts v. McGhee*,³ between being specially charged or not with the enforcement of a statute. In fact, as Justice Peckham pointed out, in *Smyth v. Ames* "There was no special provision in the statute as to rates, making it the duty of the attorney general to enforce it, but, under his general powers, he had authority to ask for a mandamus to enforce such or any other law."

Justice Harlan now sought to explain away the *Reagan* and *Smyth* cases as suits against the States with their consent.⁴ Justice Brewer, in the *Reagan* case, did call attention to the fact that the State law provided for actions against the commission in any court of competent jurisdiction in Travis County, and that "the United States circuit court might be considered as coming within that description." And the case has been referred to since as decided upon that ground.⁵ The real ground of the decision, however, was

¹ 154 U. S. 362.

² 169 U. S. 466.

³ 172 U. S. 516.

⁴ This, of course, involves the view, which is opposed in Part I, p. 29, that consent of a State may confer jurisdiction on the federal courts in cases coming within the prohibition of the eleventh amendment.

⁵ *D. & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218; *Barney v. N. Y.*, 193 U. S. 430.

clearly that the suit was not a suit against the State. Justice Harlan's explanation of *Smyth v. Ames* is very weak. It involves a direct conflict with the decision in *Smith v. Reeves*,¹ in which he himself delivered the opinion, that, in giving its consent, a State may limit suits against itself to its own courts.

The cases that gave trouble were *Ex parte Ayers*² and *Fitts v. McGhee*.³ The *Ayers* case was as follows. It having been held, in *Poindexter v. Greenhow*, that, when a taxpayer had tendered coupons which the State had contracted to receive for taxes, any attempt to collect the tax thereafter was an unlawful trespass, a State statute was passed, providing for suit in the name of the State for the recovery of the taxes in such cases, and imposing onerous conditions on the proof of tender, which it was alleged were unconstitutional.⁴ A bill was brought by holders of coupons against the attorney general and various commonwealth attorneys to restrain such suits. If the case had come up simply on appeal from the circuit court, it might have been decided on other grounds, and never have risen to vex the court. For the plaintiffs were not taxpayers who had tendered coupons, and were, therefore, probably not in a position to bring the suit.⁵ It would seem, also, that the remedy by defense at law was adequate, and that, therefore, there was no ground for equitable relief. However, these questions did not arise; for the case came up on petition for habeas corpus, upon sentence for contempt for violation of the temporary restraining order of the circuit court. The court held that the suit below was in effect a suit against the State.

Justice Peckham stated *Ex parte Ayers* thus: "A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by

¹ 178 U. S. 436.

² 123 U. S. 443.

³ 172 U. S. 516.

⁴ So held, later, in *McGahey v. Va.*, 135 U. S. 662.

⁵ See *Marye v. Parsons*, decided in connection with *Poindexter v. Greenhow*.

directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." And again: "But the injunction asked for . . . was to restrain the State officers from commencing suits under the act of May 11, 1887 (alleged to be unconstitutional), in the name of the State, and brought to recover taxes for its use, on the ground that, if such suits were commenced, they would be a breach of a contract with the State." This is all the explanation of *Ex parte Ayers*; and it is manifestly no explanation at all. The suit did not attempt to compel the State officers to do anything. The fact that the alleged unconstitutional acts sought to be restrained would have been a breach of the contract of the State made no difference, if the commencement of suits under the circumstances was equivalent to a trespass like that in *Poindexter v. Greenhow*. The opinion in *Ex parte Ayers* went squarely on the ground that the mere bringing of an action in the name of the State could not be charged against the officers as an individual wrong: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the circuit court, reduced to the mere bringing an action in the name of and for the State against taxpayers, who, although they may have tendered tax receivable coupons, are charged as delinquent, cannot be alleged against them as an unconstitutional act in violation of any legal or contract rights of such taxpayers."¹

Justice Peckham also said: "The injunction was declared illegal because the suit itself could not be entertained, as it was one against the State to enforce its alleged contract. It was said, however, that, if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. It was not stated that the suit or the injunction was necessarily confined to a case of threatened direct trespass upon or injury to prop-

¹For a fuller exposition of the views of Justice Matthews, see above, Chap. V.

erty." This is sophistical. Certainly, if the suit could be entertained, the injunction could be granted. But whether the suit could be entertained, depended upon whether the suits in question might be enjoined. It is true, if the State were a party, other grounds for enjoining the suits might exist. Any equitable ground would suffice. For instance, if the State were about to bring suit upon a chose in action, to which an equitable defense existed, the suit might be enjoined if the State could be made a party, and the agents of the State incidentally included in the injunction. But, of course, this ground would not suffice, if the State could not be made a party, for an injunction against the agents. For such a separate right of action against the agents, other grounds must exist; the acts threatened must be violations of rights in rem. And the question in *Ex parte Ayers* was: could the threatened suits be regarded as equivalent to trespasses like that in *Poindexter v. Greenhow*? It was answered in the negative. It may be said, however, that the decision was made under a general tendency to limit suits against public officers to cases "where the acts complained of, considered apart from the official authority alleged as justification, and as the personal acts of the individual defendants, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character"; a tendency which has not prevailed.¹

Even more directly in point was *Fitts v. McGhee*. A statute of Alabama, 1895, fixed the rates of toll that might

¹ See above, Chap. V. The decision, though not the opinion, in *Ex parte Ayers* may, perhaps, be explained on the ground that, the taxes themselves being perfectly valid, the State had the right to demand them as often as it pleased, subject to the right of the taxpayers to make tender of the coupons; that the suits were only a form of demand; and that this lawful form of demand was not made unlawful in itself by the imposition of unconstitutional conditions on the proof of tender. (If the taxes were unconstitutional, it would seem that there was no right even to demand them.) Consequently, that there was no unlawful act threatened. This would not, of course, be strictly a question of jurisdiction. But relief from sentence for contempt has been extended beyond the lack of jurisdiction in the strict sense.

be charged for crossing a certain bridge, under a penalty of \$20 for each violation, to be recovered by the persons overcharged. The receivers of the railroad company owning the bridge, alleging that the rates were so low as to be unconstitutional, brought suit to restrain the attorney general from instituting any proceedings, by mandamus or otherwise, to compel the observance and obedience of the act fixing the rates of toll, or for the forfeiture of the franchise of the railroad company in and to the bridge for failure to obey the act. Also, against a certain named individual and all persons whatsoever, to restrain from instituting suits for penalties, and from procuring the institution of any suit by the State officers. Before final hearing, an amendment to the bill recited that numerous indictments against the agents of the company were being brought under a law of the State making it a misdemeanor to charge unreasonable rates; and the injunction was extended to restrain the State solicitor for the judicial district within which the bridge was located from prosecuting criminal proceedings against anyone for violation of the alleged unconstitutional statute fixing rates. The supreme court, on appeal, held the suit to be in effect against the State.

Justice Peckham explained the case away on the ground that the act under which the indictments were brought "was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls," and that the penalties for disobeying the latter act, by demanding and receiving higher tolls, "were to be collected by the persons paying them," no officer of the State having "any official connection with the recovery of such penalties." This entirely overlooks the relation of the attorney general to the alleged unconstitutional act—the proceedings by mandamus or otherwise that might be instituted by him. Besides, there was no suggestion of such a distinction in the opinion in *Fitts v. McGhee*. The indictments under the act against unreasonable tolls seem to have been regarded as used to

enforce the act fixing the tolls.¹ The decision was based squarely on *Ex parte Ayers*. True, it was said that "neither of the State officers named had any special relation to the particular statute alleged to be unconstitutional." But this did not mean that the officers had no direct relation to the statute; it meant that their relation was only in the ordinary exercise of their offices, and not, as in other cases which had to be distinguished, by virtue of any special connection.² The ground of the decision is clearly shown by this quotation: "There is a wide difference between a suit against individuals holding official position under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State, merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceeding in the courts of the State."³

So far as precedents were concerned, then, there was, on the one hand, the principle announced in the *Ayers* and *Fitts* cases, a principle which had never been questioned. On the other hand, there was the logic of the decisions in the *Reagan* and *Smyth* cases. Clearly, the court, in *Ex parte Young*, was not compelled by precedent. In deciding as it did, it was no doubt influenced by the fact that the principle of *Fitts v. McGhee* was being abused by State rate legislation imposing such enormous penalties for violation as practically to coerce submission without a test of the constitutionality of the rates. Evidently, the enforcement of rates by such proceedings would work just as serious an injury to constitutional rights as any direct trespass to accomplish the same result. Necessity seemed to require the decision. Justice Harlan showed that there was no

¹ The case was cited to this effect in *D. & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217.

² As already stated, this distinction was shown to be groundless by Justice Peckham.

³ Justice Harlan, who had delivered the opinion of the unanimous court in *Fitts v. McGhee*, said of Justice Peckham's explanation: "The *Fitts* case is not overruled, but is, I fear, frittered away or put out of sight by unwarranted distinctions."

such necessity in the case at hand, at least. The bill in the suit below had been brought by stockholders of the railroad companies concerned, to enjoin the railroads from obedience to the rates prescribed, as well as to enjoin the State officers from enforcement of the act. So that, at the time the attorney general committed his contempt, the railroad company was acting under order of the federal court, and was, therefore, protected by this defense against any action that might be brought in the State courts, as was held in *Hunter v. Wood*.¹ Such a situation would arise, however, only under the operation of the equity rule which enables stockholders, in certain circumstances, to enjoin the corporation from obeying an unconstitutional law to the injury of the corporation.²

Accepting the view that suits to enforce an unconstitutional statute may be equivalent to a trespass, there remain other objections. There is, in the first place, section 720 of the revised statutes,³ forbidding the granting of a writ by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Strangely, this statute, though much relied upon in *Gunter v. Atlantic Coast Line Railroad Company*, was not discussed in either opinion in *Ex parte Young*. Yet it seems to offer an insuperable bar. Its prohibition extends, of course, not merely to writs addressed directly to State courts, but also to writs to enjoin parties from instituting proceedings in State courts. It is limited, to be true, by the doctrine of *Dietzsch v. Huidekoper*, that a federal court may enjoin such proceedings where necessary to the effective exercise of its own jurisdiction. Under this doctrine, a party to a suit in a federal court may be enjoined from bringing in the State courts suits involving the same question between the same parties. In the *Gunter* case, for example, the State having been a party to the original suit,

¹ 209 U. S. 205.

² State decisions contrary to *Ex parte Young* are *R. R. Com. v. T. & A. R. R. Co.*, 24 Fla. 417; *State v. So. Ry. Co.*, 145 N. C. 495.

³ U. S. Comp. Stat. 1901, p. 581.

in which a certain tax was held unconstitutional, it was held that section 720 did not bar an ancillary suit to enjoin the agents of the State from suing in the name of the State for the same taxes.

In *Ex parte Young*, Justice Peckham said: "The question that arises is whether there is a remedy that the parties interested may resort to, by going into a federal court of equity, in a case involving a violation of the federal constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings." Now, if enjoining the suits in such a case could be thus regarded as incidental to the action against the officers, there would, of course, as in the *Gunter* case, be no need of holding such suits to be equivalent to a trespass. But it is utterly improper to regard them so in a case like *Ex parte Young*, where the only relation of the officers to the statute was, as law officers of the State, to bring formal suits in the name of the State. There was no right of action against the officers to test the constitutionality of the statute, as incidental to which suits by the officers with the same object might be enjoined. The only right of action against the officers was to restrain the suits as equivalent to a trespass; and the only bearing of the question of constitutionality of the statute was with respect to whether the officers had lawful authority for their otherwise wrongful acts. The prohibition in section 720 is, of course, purely statutory; and whether it properly applied or not does not affect the main principle of the case.

Another ground of objection, strongly urged by Justice Harlan, is that to shut out a State from appearing in its own courts, by enjoining all its officers, is contrary to our federal form of government. Justice Peckham admitted: "It is proper to add that the right to enjoin an individual, even though a State official, from commencing suits under

circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a State court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account." Justice Harlan answered: "If an order of the federal court forbidding a State court or its grand jury from attempting to enforce a State enactment would be a violation of the whole scheme of our government, it is difficult to see why an order of that court, forbidding the chief law officer and all the district attorneys of a State to represent it in the courts, in a particular case, and, practically, in that way closing the doors of the State courts against the State, would not also be inconsistent with the whole scheme of our government, and, therefore, beyond the power of the court to make." It may be said, however, that, even if Justice Harlan's argument be fully accepted, limitations growing out of our federal form of government seem to yield before exigencies sufficiently strong.¹

From the foregoing exposition, it is plain that *Ex parte Young* was a very difficult case. The court succeeded in agreeing, however, with only one dissent: and the decision, made upon the fullest consideration, may doubtless be accepted as final. Its immediate effect upon rate regulation will probably be good; it will check the tendency back to the unsatisfactory method of regulation directly by the legislature, in order to avoid, under the principle of *Fitts v. McGhee*, the control of the federal courts.² In its full

¹ For example, *S. C. v. U. S.*, 199 U. S. 437.

² Another State plan of confining the determination of the legality of rates, in the first instance, to the State courts, by making the fixing of the rates a judicial act, was frustrated in *Prentiss v. Atl. C. L. R. R. Co.*, 211 U. S. 210.

scope, the decision is startling. Whether a new departure in principle or not, the case certainly marks a radical expansion in the practical control of the federal courts over State activities. It enables a federal court to enjoin criminal prosecutions under any State law alleged to be unconstitutional, provided only equitable grounds exist. It has already led to a strong movement to regulate strictly the exercise of this power by the federal courts.¹

¹ Congressional Record, 60th Congress, 1st session, p. 133. President's message, December 3, 1907. Meeting of attorneys-general of States, September and October, 1907.

CHAPTER VII.

FEDERAL QUESTION—WHEN INVOLVED IN SUITS AGAINST STATE OFFICERS.

A right of action against public officers exists, as appears from the foregoing chapters, whenever they threaten acts that violate rights in rem. These acts, otherwise unlawful, are lawful if done under valid authority of the State. Whenever the validity of the authority set up depends upon the constitution of the United States, a federal question is involved.

In *Ex parte Young*, Attorney General, now Governor, Hadley of Missouri, of counsel for petitioner, stated the following dilemma: "If the act sought to be enjoined is not the State's act, the fourteenth amendment is not involved. If the act sought to be enjoined is the State's act, then the eleventh amendment interposes to deny jurisdiction."¹ Now, in the first place, it is not necessary, to avoid conflict with the eleventh amendment, to regard the act of the officer as not the act of the State. If the act is wrongful, an action lies against the officer, whether his act is the act of the State or not. Moreover, it is not necessary, to involve the fourteenth amendment, that the act of the officer under an unconstitutional statute be regarded as the act of the State. It is true the prohibitions of the fourteenth amendment apply only to State action. But, whether the acts of the officer be regarded as the acts of the State or not, the fourteenth amendment is involved whenever the State authority set up is alleged to be in violation of the amendment. If the act be regarded as not the act of the State if unconstitutional, then the question is whether it is prevented from being the act of the State by the fourteenth amendment.

¹Quoted from an article by Hadley: "The Eleventh Amendment": 66 Cent. Law Jour., 71, 75.

To involve a question under the fourteenth amendment, then, there must be a State authority set up, alleged to be in violation of the amendment. What constitutes a State authority in this sense? One view might be that State authority is involved whenever action is taken by virtue of official position under the State. On the other hand, it might be held that State authority is in question only when the action has valid authorization so far as State law is concerned. The latter view is not followed throughout, at any rate. For action of officers under a State statute will always be tested under the fourteenth amendment, even if the statute is alleged to violate also the State constitution. In other words, although prohibited by higher State authority, the statute is sufficiently State authority to invoke the test of the fourteenth amendment.

This leads to a consideration of *Barney v. City of New York*.¹ In that case, there was no diverse citizenship, so that jurisdiction depended entirely upon the existence of a federal question. A bill was brought in the United States circuit court to enjoin the city of New York, the board of rapid transit commissioners, and certain contractors from proceeding with the construction of a tunnel under Park Avenue, adjacent to the premises of plaintiff, "until the easements appurtenant thereto shall have been acquired according to law and due compensation made therefor"; it being alleged that the tunnel was being constructed nearer his premises than provided in the plan adopted in compliance with the requirements of the State law in case of such a construction. That is, the threatened act was alleged to be illegal under the State law, and at the same time to "deprive of property without due process of law," by taking easements without compensation.² The court upon its own motion dismissed the bill for want of jurisdiction. The supreme court affirmed the decision, on the ground that the act, being illegal under State law, was not

¹ 193 U. S. 430.

² The fourteenth amendment applies, of course, to the action of local governments, as well as of other State agencies.

State action, so that the fourteenth amendment did not apply.

The opinion of the court, by Chief Justice Fuller, is far from convincing. The case mainly relied upon is *Virginia v. Rives*,¹ in which was denied the right to remove a criminal action to the federal court, under a statute providing for such removal in case of "denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States," upon the allegation that the officer charged with the selection of jurors would discriminate against negroes in the selection. Now, the officer had no authority under the State law to make such a discrimination; and the supreme court simply held that, under these circumstances, there was not sufficient ground to presume that the petitioner could not enforce his rights in the judicial tribunals of the State—that to raise such a presumption, there must be a State statute, which, if enforced, would violate such rights. The court expressly said that the act of congress was not as broad as the fourteenth amendment. A like discrimination, under the same State law, was held, in *Ex parte Virginia*,² to be sufficiently State action to be punishable under the power to enforce the fourteenth amendment. Justice Strong said: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."³

The other cases cited by Chief Justice Fuller for the

¹ 100 U. S. 313.

² 100 U. S. 339.

³ Chief Justice Fuller's explanation of *Ex parte Virginia* as "a case in which what was regarded as the final judgment of a State court was under consideration," is most astonishing; for it was expressly held in that case that it was not an attempt to punish State judicial action.

"principle that it is for the State courts to remedy acts of State officers done without the authority of or contrary to State law—" *Missouri v. Dockery*¹ and the Civil Rights Cases—² furnish no better support. The Civil Rights cases are not in point at all, no action of State officers being involved. And *Missouri v. Dockery* was decided expressly on the ground that the acts in question were within State competence without violation of any federal limitation; so that whether they were authorized by State law or not raised no federal question.³

The decision in *Barney v. New York* may be sustained only upon the view that, where a higher State authority prohibits, no State authority exists to be tested under the fourteenth amendment. But this is certainly contrary to the practice of testing a State statute under the fourteenth amendment, although the statute is also in violation of the State constitution. And it seems more reasonable to hold that, whenever action is taken "by virtue of public position under a State government," it is sufficient to raise the question whether such action is prohibited by the fourteenth amendment, although it may also be contrary to State law.

The case of *General Oil Company v. Crain*⁴ may best be considered here. A bill was brought in a Tennessee court to enjoin the State oil inspector from collecting inspection fees on oil brought to Memphis from Ohio, already sold for shipment into other States, but car-loads put into tanks in Memphis for subdivision for distribution; it being alleged that the oil was exempt from State control as interstate

¹ 191 U. S. 165.

² 109 U. S. 3.

³ The act of an officer in the exercise of his authority under a statute is, of course, just as much the act of the State as if specifically directed by statute; for instance, the fixing of rates by a commission, as in *Reagen v. Farmers L. & T. Co.* See also *Fargo v. Hart*, 193 U. S. 490; *Gen. Oil Co. v. Crain*, 209 U. S. 211. The opinion in *La. v. Texas*, 176 U. S. 1, seems contrary. In *Arbuckle v. Blackburn*, 191 U. S. 405, no federal question was involved, because the act of the officer was simply a finding of fact under a State law admitted to be valid.

⁴ 209 U. S. 211.

commerce. The State court dismissed the bill for lack of jurisdiction, upon a construction of a State law of 1873, prohibiting suits against the State "or any officer acting by the authority of the State, with a view to reach the State, its treasury, funds, or property." In a previous case, the State court of Tennessee had sustained a suit against officers of the State acting under a statute alleged to be unconstitutional, on the ground that, when acting under an unconstitutional statute, officers are not acting for the State. In the present case, however, the inspection law was not alleged to be void on its face, but only on the ground that the oil upon which defendant was about to impose inspection fees was in law affected with interstate commerce. To enter into the inquiry involved in this contention, the court said, it would be necessary first to determine whether the oil in the tanks was in fact and in law a part of interstate commerce; and this the court had no jurisdiction to do, because of the law of 1873.

Now, the State court was clearly wrong; for there was nothing more to prevent an inquiry whether the commerce clause applied to the oil in question upon action of a State officer under a State statute, than upon a statute itself. But the question was, upon writ of error to the supreme court, whether any federal question was involved, the ruling of the State court having been entirely upon the ground of lack of jurisdiction under the State law. The court held there was, because the State court had "refused to consider that which might bring the oil under the protection of the constitution of the United States." "It being, then, the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court. *R. R. Co. v. Alsbrook*."¹

This is no argument at all, for, manifestly, any dismissal for lack of jurisdiction of a suit for violation of a con-

¹ 146 U. S. 279.

stitutional right by a State statute, even if the suit were directly against the State, would give effect to the statute. *Railroad Company v. Alsbrook* is not in point. In that case the State court ruled upon the federal question. Justice McKenna reviewed the cases in which it had been held that a decision by the State court upon its own jurisdiction is final, and then dismissed them with the remark that "in none of these cases was the same question presented as here," without any real attempt to distinguish them. The only proper ground for the decision would seem to be that a remedy of right existed against the officer for violation of a constitutional right, and that a State statute or decision denying this remedy, even upon the ground of lack of jurisdiction, was itself unconstitutional.¹

¹ The ruling of the State court was affirmed on the ground that the inspection tax in question was not unconstitutional. Justice Harlan concurred in the judgment on the ground that the decision of the State court as to its own jurisdiction was final. Justice Holmes concurred specially.

CHAPTER VIII.

THE RELATION OF THE STATE TO SUITS AGAINST ITS OFFICERS.

In suits against public officers directly affecting the state—for instance, where the defense in an action of ejectment against officers depends upon title of the state,—the state may, without becoming a party, by formal suggestion by its law officer, bring its rights before the court.¹ This special privilege extends even to participation in argument.² Whether, in such a case, in which the state has not submitted itself to the jurisdiction of the court, it may prosecute in its own name a writ of error from a ruling, has not been squarely decided by the supreme court;³ although the opinion in *South Carolina v. Wesley* inclines strongly against the right.

The basic problem remains to be considered: is a suit against public officers ever a suit against the state?⁴

In *Osborn v. Bank*, Chief Justice Marshall said: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. . . . The State not being a party on the record, and the court having jurisdiction over

¹ *U. S. v. Lee*, 106 U. S. 196; *Stanley v. Schwalby*, 162 U. S. 255; *Belknap v. Schild*, 161 U. S. 10.

² *Fla. v. Ga.*, 17 How. 478.

³ It was not necessary to decide the point in *U. S. v. Lee*, because the same questions were raised in the bill of exceptions of the individual defendants. And in *S. C. v. Wesley*, 155 U. S. 542, the exceptions below had not been properly taken nor brought up.

⁴ Apart, of course, from where the state has provided therefor as a form of action against itself. See Part I, p. 40.

those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants—whether they are to be considered as having a real interest, or as being only nominal parties.” This was held settled doctrine as late as *Davis v. Gray*.¹

Even in *Davis v. Gray*, however, two justices, dissenting, held the suit against the officers to be in effect against the State. In *Carr v. United States*,² Justice Bradley showed strongly his opinion that suits against public officers, like that in *United States v. Lee*, are suits against the United States. And, in *United States v. Lee*, the four dissenting justices held the suit to be in effect against the United States. In *Louisiana v. Jumel*, the suit against officers was held to be against the State. In *Cunningham v. Macon and Brunswick Railroad Company*, the suit was dismissed because the State was an indispensable party. So that, by the time of *Poindexter v. Greenhow*,³ the court was in a position to say, as a matter of course: “It is also true that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.” Since then, it

Justice Harlan, dissenting, in *Ex parte Ayers*, stood squarely upon it.

Justice Matthews said that the language of Chief Justice Marshall “conveys the intimation that, where the defendants, who are sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject-matter.” But Chief Justice Marshall expressly said that “the question is not one of jurisdiction.”

Justice Matthews sought to support his interpretation by the opinion of Chief Justice Marshall in *Ga. v. Madrazo*. 1 Pet. 110. But in that case the chief justice merely considered that the suit against the governor as governor might suffice as a suit against the State; as it seems to have been intended, on the theory that the eleventh amendment does not apply to suits in admiralty. Since the suit was brought in this aspect, it could hardly be regarded as against the governor personally. If it could, however, the reason for dismissal was stated by Chief Justice Marshall to be that no case was made out against him.

² 98 U. S. 433.

³ 114 U. S. 270.

has been "the settled doctrine of the court that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit."¹

Two cases mainly impelled the court to this doctrine that the court will look behind the parties to the record—*Cunningham v. Macon and Brunswick Railroad Company*² and *New Hampshire v. Louisiana*.³ The *Cunningham* case was a suit to foreclose a mortgage upon a railroad, to which the State held the legal title under a deed of trust. It was held that the State was an indispensable party to the suit, and, therefore, that the suit could not be maintained. Indispensable parties are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."⁴ In other words, a court will not exercise jurisdiction in a case where it cannot do substantial justice without the presence of other parties—that is, where any judgment it might render between the parties to the record would be subject in such manner to the rights of persons not parties that the judgment would not be complete. The relation of indispensable party can exist, then, only where the party to the record and the indispensable party both have an interest in the same subject-matter of the suit, so related that one cannot be disposed of properly without the other. Now, manifestly, there is no such relation between the state and its officers. They have no personal interest in the subject-matter of suits against them as officers; the suits are never based on any such interest. Hence the doctrine of indispensable party has no place.

¹ Justice Lamar, in *Pennoyer v. McConaughy*.

² 109 U. S. 446.

³ 108 U. S. 76.

⁴ See Part I, p. 39.

In *New Hampshire v. Louisiana*, suit was brought by the State of New Hampshire on bonds of Louisiana assigned to it for collection by its citizens, who retained the beneficial interest. The court held that the real parties to the suit were the citizens of New Hampshire, and therefore dismissed the suit as against a State by citizens of another State. This is the case always mainly relied upon for the doctrine that the court will look behind the nominal parties to the real parties in interest. The point involved was, however, entirely different from that in a suit against public officers. In *New Hampshire v. Louisiana*, the State represented its citizens, so that they might be said to be not only the real parties in interest, but the real parties to the suit. In a suit against public officers, on the other hand, there is no pretence that the officers represent the state in the suit; so that it cannot be said that the state is a real party to the suit. The doctrine of nominal party and real party, therefore, likewise has no place.

What may be true is that the only real ground of action in the case is against the state. But the fact that there is no real ground of action against the officers, and that there is a real ground of action against the state, does not make a suit against the officers a suit against the state. Chief Justice Marshall was clearly right in holding that the question is not whether the suit is against the state, but whether there is a real ground of action against the officers. This is conclusively proved by comparing the two cases of *United States v. Lee* and *Chandler v. Dix*. The interest of the state in the subject-matter of the suit was precisely similar in the two cases; the judgment against the officers in neither case, of course, would bind the state: yet in the one case the suit was upheld, because there was a real ground of action against the officers themselves, and in the other dismissed, because there was no such ground of action. It may have been observed that, throughout this study, the question of whether suits against public officers may be maintained has been determined, not upon the interest of the state, but

upon the question whether there is a real ground of action against the officers.

As a matter of fact, although the doctrine that the court will look behind the record to determine whether the state is the real party has been constantly announced, the cases rather harmonize with the other view. Generally, of course, it makes no practical difference whether the decision is put upon the ground that the suit is against the state, or that there is no ground of action against the officers. But sometimes it is material whether the question is one of jurisdiction. If the question is whether the suit is against the state, then, clearly, it is one of jurisdiction. In this view, if the case upon the record may be a suit against the state, then it is the duty of the court, even upon its own motion, to inquire into the question of jurisdiction.¹ Yet the court certainly has not taken this attitude. In *Smyth v. Ames*, Justice Harlan, delivering the opinion of the court, said of the objection that the suit was against the State: "This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the State board. It would, therefore, be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction," on the grounds both of diverse citizenship and of a federal question. And in *Illinois Central R. R. Co. v. Adams*,² it was squarely held that the question was not one of jurisdiction, and that it was error in the court below to decide it upon a motion to dismiss for want of jurisdiction.³

¹ *Postal Tel. Co. v. Ala.*, 155 U. S. 482; *Minn. v. Hitchcock*, 185 U. S. 373.

The only case in which this has been done, so far as I know, in a suit against public officers, is *Lowry v. Thompson*, 25 S. C. 416.

² 180 U. S. 28.

³ *Cotting v. Godard*, 183 U. S. 79, and *Prout v. Starr*, 188 U. S. 537, bear out the same view.

In *Minn. v. Hitchcock*, in a suit by a State against the secretary of the interior, the court did inquire into the question of jurisdiction upon its own motion. But there it was held that the suit was a form of action against itself provided by the United States; and it was necessary to inquire whether the court had jurisdiction of such a case.

On the other hand, are the cases in which a petition for habeas corpus has been entertained, upon a sentence for contempt for violation of an injunction against public officers.¹ In *Ex parte Ayers*, the petitioner was released on the ground that the court below had no jurisdiction, because the suit was against the State. And Justice Harlan dissented on the ground that the question of jurisdiction was the only one involved, and that was determined by the parties to the record. None of the other questions involved in the main suit, he said, was to be considered, not even "whether an officer ought to be enjoined from merely bringing a suit in behalf of the public, the suit itself not necessarily, or before judgment therein, involving an invasion of the property rights of the defendant therein." But the courts have not generally limited the inquiry in such cases to the question of jurisdiction in its strict sense. And where the objection to the suit below is not to the merits of the ground of action as made out, but that no real ground of action is made out against the officers, it would seem sufficient to justify a release, although not strictly a question of jurisdiction. In *Ex parte Young*, although the question was stated to be whether the suit below was in violation of the eleventh amendment, the actual basis of discussion through the whole opinion was whether there was a real ground of action against the attorney general. The inquiry was even made, as vital to the case, whether the attorney general had any actual duties in the enforcement of the statute. Surely this was not a question of jurisdiction, and could not affect the question whether the suit was against the State.

No court of justice, certainly, will suffer an attempt to enforce a right of action against one person in a suit against another. For instance, in a suit for the destruction of property used in infringement of a patent, if it appears that the party sued has no interest, but that the property belongs to another, the court certainly will not proceed, even though

Ex parte Ayers and *Ex parte Young*.

the party sued make no objection, because to do so would be contrary to the first principles of justice.¹ Whether this be regarded as a question of jurisdiction, however, is, after all, comparatively unimportant here. What is essential is that suits against public officers be considered from the right point of view. Whatever error appears in the cases has resulted from taking the interest of the state as a criterion.² The proper inquiry in every case should be not what is the interest of the state, but whether there is a real ground of action against the officers.³

This basis of determination, it is true, is purely legal. In fact, though not in legal theory, the state is bound by decisions against its officers such as in *United States v. Lee* and in *Ex parte Young*. Practically, the rights of the state are determined in such cases. The doctrine of immunity of the state from suit might have been given a liberal construction. The eleventh amendment might have been held to exclude any suit that actually directly binds the State. But this construction was conclusively rejected in *Osborn v. Bank*. If it had been adopted, constitutional limitations would have been dead letters. Given *Osborn v. Bank*, the only logical principle of construction is to follow consistently legal theory, according to which public officers may be sued whenever there is a separate ground of action against them.

¹ This, as I understand it, is different from the doctrine of indispensable party. That doctrine applies, not where an attempt is made to determine the rights of persons not parties, but where no satisfactory or effective judgment can be rendered between the parties, if those rights remain undetermined.

² As in *Louisiana v. Jumel* (see above, p. 69); and especially in *Belknap v. Schild* (see above, p. 50).

³ Where a real ground of action exists, a suit against public officers as such is never of such a nature that an effective remedy cannot be given between the parties to the record without other parties.

DAVID RICARDO

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and
Political Science

DAVID RICARDO

A CENTENARY ESTIMATE

BY

JACOB H. HOLLANDER, PH.D.

Professor of Political Economy in the Johns Hopkins University

BALTIMORE
THE JOHNS HOPKINS PRESS

1910

COPYRIGHT 1910, 1911 BY
THE JOHNS HOPKINS PRESS

PRESS OF
THE NEW ERA PRINTING COMPANY
LANCASTER, PA.

TO MY WIFE

PREFACE

This little work consists of three lectures, delivered at Harvard University in the spring of 1910, to mark the centenary anniversary of the appearance of Ricardo's first important publication, "The High Price of Bullion, a Proof of the Depreciation of Bank Notes."

CONTENTS

	PAGE
I. THE LIFE	II
II. THE WORK	57
III. THE INFLUENCE	115

DAVID RICARDO

I

THE LIFE

On May 31, 1876, the one hundredth anniversary of the "Wealth of Nations" was celebrated in London under most distinguished auspices. A brilliant company of publicists and scholars gathered at the invitation of the historic Political Economy Club; the Prime Minister of Great Britain occupied the chair; the French Minister of Finance was the guest of honor, and a succession of accomplished speakers undertook to estimate with sympathy and enthusiasm 'the more important results which have followed from the publication of the "Wealth of Nations," and the principal directions in which the doctrines of that book still remain to be applied.'¹

A generation has passed, and again the devotees of economic science are face to face with a centenary anniversary. In January, 1810, one hundred years ago appeared the "High Price of Bullion"—the first formal contribution of David Ricardo to economic writing and the beginning of an identification with the science upon which he was to leave so marked an impress.

Obviously these two occasions are different in kind. The one is the tribute to a book; the other, to an influence. Indeed the contrasts which the two anniversaries suggest are as significant as their association: Adam Smith, the learned academician, the distinguished philosopher, the centre of an influential coterie of scholars and publicists—David

¹ Minutes of Proceedings (1881), vol. iii, p. 77, for an account of the celebration; a full report was also published by the Political Economy Club in a separate pamphlet, now become rare.

Ricardo, the self-taught man of affairs, the conspicuously successful financier just broadening from casual interest in every day happenings to intent concern in economic issues; the "*Wealth of Nations*," a formal treatise in two stately quartos, long years in the making, heralded by scholars as "equal to what has ever appeared on any subject of science whatever,"¹ and securing for its author "as near an approach to immortality as can fall to any economic writer"²—the "*High Price of Bullion*," a loosely printed pamphlet of some forty pages, quickly conceived and hastily written, undertaking to "add but little to the arguments which have been so ably urged" by others,³ and long since engulfed in the swift moving stream of current controversy.

But although Ricardo's entry into economic science is marked by no epoch-making contribution, his influence upon the science has been great and determining. It is appropriate to the nature and extent of that influence that the centenary anniversary of his debut should be marked by some sober appreciation, and that before a company of students in an academic environment long distinguished for its sympathetic though discriminating interpretation of the Ricardian economics,⁴ an attempt should be made to answer the question which many years ago J. R. McCulloch proposed to a company of English economists: "What are the principal additions made by Mr. Ricardo to the science of Political Economy?"⁵

Before undertaking to review in succession the life, the

¹ Adam Ferguson's foot note to the fourth edition of his *History of Civil Society* published in 1773; cf. John Rae's *Life of Adam Smith* (1895), p. 264.

² Dr. James Bonar's admirable account of Adam Smith in *Palgrave's Dictionary of Political Economy*.

³ Introduction to *High Price of Bullion*; this interesting prefatory statement was omitted by Ricardo from the fourth "corrected" edition of the tract—the one inserted by McCulloch is his edition of Ricardo's Works.

⁴ Professor Dunbar's brilliant note on "Ricardo's Use of Facts" in the *Quarterly Journal of Economics*, July, 1887, still serves as perhaps the most helpful starting point for intelligent study of Ricardo's theoretical writings.

⁵ Meeting of Political Economy Club, December 6, 1838; see *Minutes of Proceedings* (1882), vol. iv, p. 137.

work and the influence of Ricardo as a political economist, it has seemed important to consider the background of affairs and thought against which that life and work are projected. Intellectual heritage and immediate environment are phases of personal biography; but an active career is affected quite as much by the deeper and more general forces of thought and action that dominate the period. So too any just appreciation of Ricardo's place in the history of economic thought must take account of the larger movements of his life-span no less than of its immediate contacts.

Ricardo was born in 1772 and died in 1823. Just as Adam Smith's career extends over the second and third quarters of the eighteenth century, Ricardo's life thus includes the last quarter of the eighteenth century through the first quarter of the nineteenth. It is practically coincident with the fifty years of English history which intervene between the American Revolution and the final reaction from the Napoleonic era, which remove the organization of the London Clearing House in 1775 from the panic of 1825 and which separate the appearance of the "Wealth of Nations" in 1776 from the publication of McCulloch's "Principles of Political Economy" in 1825. To the historical economist, it is the fifty years of the industrial revolution; to the political historian, it is the half century of the Napoleonic influence; to the historian of economic thought, it is the dawn and early morning of the classical political economy.

If without venturing to appraise this half century as an historical period or to interpret it as an economic epoch, we should undertake simply to designate those basic elements which influenced life and thought therein by sheer pervasiveness, it is clear that there are at least three phenomena of such absolute importance and far-reaching effect as, from first to last, in one form or another, to dominate the period. These are agricultural ferment, industrial expansion and ✓ financial activity. It is hardly too much to say that from 1775 to 1825, no intelligence was evolved in England, in

any degree interested in economic happenings, which did not in its growth reflect the presence and working of these factors. That the agriculturists were undergoing extreme vicissitudes and complaining noisily as to them, that the manufacturers were rolling up great profits upon the maintenance of which the nation's very life was popularly regarded as dependent, that the consumer was suffering from a crushing burden of taxation, and that the funded debt was swelling to proportions which threatened the collapse of public credit—these facts loom forth with vivid clearness in what might be termed the Ricardian background, and they constitute over and above everything else the ultimate elements in Ricardo's mental history.

The several phenomena are organically related and the clue to the sequence is the progress and issue of the contest with Napoleon. The fifty years of struggle, imperfect recovery, renewed war and slow revival were made possible by tremendous increase in the nation's resources, consequent upon profound changes in its economic life. The England of 1750 must have succumbed at an early stage to the life-sapping strain of the fight. That the staggering burden could be borne at all by England of the next half century, and that eventual success attended what had resolved itself into a sheer contest of endurance, was the result of a great industrial expansion, entailing radical change in agricultural life, and involving heavy burdens of taxation and indebtedness.

In 1775 England—barring extreme seasonal fluctuations—was still a grain exporting country. In the decade from 1780 to 1790 the annual surplus was much reduced, and in the next period of ten years, with rapid increase of population, corn exports ceased. During the whole struggle with Napoleon and for five years thereafter, the average annual imports of corn alone were well over a half million quarters. From 1820 to 1825 extraordinary crops rendered recourse to foreign markets unnecessary; but thereafter importations were resumed in heavier amount, and the average for the

decade materially exceeded the figure for the preceding years. Thus, from 1775 to 1825, despite extension of cultivation and improvement in methods, England was engaged in what seemed to be an unsuccessful attempt to feed herself. Instead of producing an actual food surplus, a considerable part of the industrial product of the nation was annually surrendered in exchange for an imported food deficit.¹

The result was an intense struggle on the part of the English agriculturist and his sympathizers to preserve the home market by maintaining the domestic value of grain at what was vaguely termed "a remunerative price." This struggle was aggravated by mistaken protective legislation tending at times to a domestic glut, and it was made vehemently articulate by the social and political prominence of the land-owning class. Herein lies the explanation of that intense sensitiveness on the part of parliament and public opinion to agricultural complaints, that constitutes the agricultural ferment pervading the economic life of the half century.

This seeming food deficit resulted from no absolute dearth or physical exhaustion of English soil. England was well able if necessary to feed herself. Foreign grain was imported, in accordance with a principle soon to be formulated by economic analysis and now generally accepted as a theory of international trade, in consequence of the superior productivity of English industry. By virtue of great industrial development, England, making more goods and making them cheaper, found it advantageous to send these to other countries in exchange for corn, rather than to raise her own food supply.

The successive phases of the industrial revolution—machinery, the factory system and capitalistic organization—are set forth, in external form at least, in every manual of English social history. A remarkable series of technical inventions and natural discoveries in relation to labor processes were more and more changing the whole form

¹ Porter, *Progress of the Nation* (1851), pp. 139-140, 149.

and complexion of industrial effort in England. A given labor force working with the new appliances and under the new conditions was able to bring forth an incredibly greater per capita product. Moreover the volume of the labor force itself was increasing, and increasing not only absolutely but relatively. A population growing at an accelerated rate was available, and of this population a larger and larger proportion was drawn into the factories.

Passing the tremendous changes in the social life of the people, and particularly of the wage earning classes, which the decline of the old domestic system and the rapid growth of industrial at the expense of agricultural life meant, the conspicuous fact is that this sustained industrial expansion of a half century was the real cause of an amazing increase of the nation's resources which eventually determined the political destinies of Europe.

It is a commonplace to speak of Waterloo having been won in the chimneyed factories of England. What is perhaps less well understood, and for the intellectual history of the period even more important, is the widespread social consciousness of this very fact, that England's resisting power depended upon the flourishing condition of her manufactures and upon the maintenance, undiminished, of industrial profits. This sentiment was not voiced as loudly as the agricultural plaint, for the new industry had neither political influence nor social prominence. But it pervaded business and financial circles and became the veritable milieu of economic thought.

Just as industrial development was the occasion of agricultural ferment, it gave the possibility of financial activity. The huge additions to the national wealth accruing in the form of industrial profits were transmuted into the fleets and armies that made possible the long struggle with Napoleon. The crucible was an unparalleled resort to taxation and funding, aided by the new efficiency of English private finance. In the matter of taxation, Pitt and his successors long clung to the hope of meeting current expenses out of

the year's receipts, and in this futile endeavor made heavy additions to the existing burden of taxation, the brunt of which fell heavily on the commercial classes.¹ Over and above its own concern, taxation thus became in new and sometimes crude forms the scape-goat for much of the social distress incident to depreciation of the currency, agricultural depression and industrial reaction.

The chronic deficiency in revenue was met by extraordinary drafts upon public credit. From the commencement of the war in 1793, government loans were contracted every year, and exchequer and navy bills were funded at frequent intervals. The funded debt of Great Britain which before 1793 stood at £238,231,248 reached a total of £567,008,978 in 1802, of £734,787,786 in 1810, and of £1,003,768,694 in 1816; of this increase of £765,537,445, £658,506,728 was by new loans and £107,030,717 by funding bills. In addition two loans were raised in England for the Emperor of Germany and guaranteed by the British Government, a further loan was raised and guaranteed for the service of Portugal, and Ireland made repeated demands upon English credit.²

Out of this swelling stream of industrial profits seeking funded investment on the one hand, and the insatiable demands of necessitous finance ministers on the other, was evolved that organization of private finance with which the beginnings of England as the capital centre of the world are directly associated. The transition is neatly enough marked by the circumstance that in the Peninsular War the British commissary-general made desperate and unavailing efforts to supply the troops in the field by actual remittance of specie; whereas in the Waterloo campaign through the extensive international connections of the new financial interests just then coming into power, the troops were paid and the foreign subventions met with the utmost facility

¹ Cunningham, *Growth of English Industry and Commerce in Modern Times* (1892), p. 551.

² Hamilton, *Inquiry concerning the National Debt* (3d edition, 1818) pp. 105, 320-322.

and promptness entirely through the medium of commercial exchange.¹

While these events were transpiring in the economic life of the nation, its economic thought was largely dominated by the "Wealth of Nations." Adam Smith's treatise required too much thought and reflection to be popular, David Hume had lamented within a month after its appearance, and the reader fresh from the pages of Gibbon's "Decline and Fall," might well have found the Scotch philosopher turgid and prolix. A little later, "the French Revolution seems to have checked for a time the growing vogue of Smith's book."² Economic doctrines, and pre-eminently the doctrines of the new economic liberalism came to be identified with French principles and the revolutionary spirit. In 1793 in reading his "Memoir of Adam Smith" to the Royal Society of Edinburgh, Dugald Stewart abandoned his intention of giving a long account of Smith's opinions because at that period, he says, "it was not unusual, even among men of some talents and information, to confound studiously the speculative doctrines of political economy with those discussions concerning the first principles of government, which happened unfortunately at that time to agitate the public mind."³

The actual demand for the book was, indeed, not unfavorably affected. While Sir James Stuart's quartos gathered dust on Cadell's shelves, Adam Smith's work sold well, and a tenth edition was reached in 1799. Similarly its influence on political thought and action was considerable. From 1783 on, the "Wealth of Nations" was referred to in parliamentary debates again and again, and almost from the very date of its publication it exerted a direct influence upon the financial policy of the country. In 1792 Pitt declared that Smith's "extensive knowledge of detail and depth of philosophical research will, I believe, furnish the best solu-

¹ Herries, *Memoir of the Rt. Hon. John Charles Herries* (1880), vol. i, pp. 86, 104, and Appendix B.

² Rae, *Life of Adam Smith*, p. 292.

³ *Ibid.*, p. 292.

tion of every question connected with the history of commerce and with the system of political economy."¹ And in 1797 Pulteney appealed to "the authority of Dr. Smith, who, it was well said, would persuade the present generation, and govern the next."²

But withal, in the closing years of the century, economic speculation had hardly assumed shape and definiteness in the general mind of the country. The term, "the science of political economy," which a decade later had become an easy phrase, was virtually unknown, and there was scanty appreciation even among cultivated classes of the scope and of the purpose of economic study. As a careful student of the period has declared, "it was necessary, in fact, to vindicate a place for Political Economy, to reiterate, enforce, and carry out, in detailed application to the existing circumstances of society, the doctrines of Smith, in order to obtain a general consideration for the science, and acceptance of those doctrines."³

This service was effectively performed by Dugald Stewart's lecture courses on political economy at the University of Edinburgh, first delivered in the winter of 1800 and repeated during eight sessions thereafter. During the greater part of this time they were the only deliberate exposition of economic principles accessible to British students. The path was not easily blazed. Political reaction was still in the air and Lord Cockburn relates that when Stewart announced his course, the mere title "political economy" made his contemporaries uneasy: "They thought it included questions touching the constitution of governments, and not a few hoped to catch Stewart in dangerous propositions."⁴

But the engaging personality of Stewart, the clearness and vigor of his critical exposition and the timeliness of his

¹ Rae, *Life of Adam Smith*, pp. 290-291.

² Buckle, *History of Civilization in England*, vol. i, chap. iv, note 61.

³ Veitch, *A Memoir of Dugald Stewart*, in *Stewart's Works* (ed. Hamilton, 1858), vol. x, p. li.

⁴ Cockburn, *Memorials of My Own Time* (1856), p. 174.

general subject matter draw to his lecture hall, and thereafter kept about him in more or less close association an audience if not large in number, at least remarkable in their then promise and subsequent performance, and comprising "not merely a proportion of students who were passing through their college years, but also, and even chiefly, an audience of riper years, especially members of the bar."¹ The average number of students enrolled was less than fifty; but the list included such names as Francis Horner, Sydney Smith, Francis Jeffrey, the Earl of Lauderdale, Henry Cockburn, Henry Brougham, Macvey Napier, Archibald Alison, James Mill and Thomas Chalmers—the group of men from whom emanated the most substantial contributions to the progress of economic thought in the next generation.²

Dugald Stewart seems to have been less of the docile expositor and more of the independent critic than he would have us believe. There came moreover from other quarters some minor dissent from certain of Adam Smith's conclusions. Arthur Young knew of "no abler work," but also of none "fuller of poisonous errors."³ James Anderson stood out vigorously for the utility of corn law bounties. Jeremy Bentham filed a cogent brief against the impolicy of usury laws. Malthus exposed the weakness of Adam Smith's reasoning in the matter of poor law relief, and the Earl of Lauderdale with much acuteness distinguished the concepts of public wealth and private riches. Francis

¹ *Memoir of Dugald Stewart, in Works, vol. x, p. lv.*

² Testimony as to the influence of Stewart's lectures upon English thought is borne by George Pryme ("Prize Pryme"), whose course of lectures on the principles of political economy delivered at the University of Cambridge in 1816, and repeated annually thereafter, appears to have been the earliest recognition by the English universities (excepting of course Malthus's activity at Haileybury College) of political economy as a subject of study. Dugald Stewart's lectures, Pryme states, "attracted so much attention, that several Members of our own University went from the South of England to pass the winter at Edinburgh, for the purpose of attending them." (*A Syllabus of a Course of Lectures on the Principle of Political Economy, 2nd edit., 1819. Preface, vii-viii.*)

³ Stephens, *The English Utilitarians* (1900), vol. i, p. 77.

Horner, declining in 1803 a publisher's invitation to furnish a set of notes for a new edition of the "*Wealth of Nations*," wrote to Thomas Thomson as to the motives which had governed his actions: "even if I had been prepared for such an undertaking, which I certainly am not yet, I should be reluctant to expose Smith's errors before his work has operated its full effect. We owe much at present to the superstitious worship of Smith's name; and we must not impair that feeling, till the victory is more complete. There are few practical errors in the "*Wealth of Nations*," at least of any great consequence; and, until we can give a correct and precise theory of the nature and origin of wealth, his popular and plausible and loose hypothesis is as good for the vulgar as any other."¹

In short no time could have been more favorable for the initiation of critical economic thought than that in which Ricardo's attention is said to have been first directed to Adam Smith's treatise.

It has been given to few men to leave as profound an impress upon a domain of thought by so brief a period of intellectual activity as David Ricardo. Born in 1772, he died at the age of fifty-one in the very prime of his powers. But of this short span, hardly more than the last ten years, certainly not more than the last fourteen years represent a scientifically fruitful stage. It was not until he was twenty-seven that political economy appears in any degree to have attracted Ricardo's attention. Another decade passed before any tangible evidence was given of special fitness for economic analysis—and then only as an anonymous contribution to current controversy. His important economic treatise appeared in 1817; he entered the House of Commons in 1819 and in 1823 he died. In little more than the time in which Adam Smith is said to have been engaged in the actual composition of the "*Wealth of Nations*," and in less than the period devoted by Malthus to the revision of

¹ Horner (ed.), *Memoirs and Correspondence of Francis Horner* (1843), vol. i, p. 229.

his "Essay on Population," the active work of Ricardo as an economist is comprised.

It is this circumstance, in the main, which explains why so little is known of the largest part of Ricardo's life. At thirty-eight his career might still have been described as that of a favorably connected, well endowed member of the Stock Exchange, who, by industry, integrity and ability had amassed a large fortune, and had won the respect of his business associates and the esteem of a limited circle of friends. His first economic composition in 1810 brought the full glare of public prominence, and the few remaining years of his life stand fairly illumined. But even then, personal reserve and perhaps painful association, left the events of his earlier years in obscurity, which neither the intimate relations nor the warm friendships of this later period removed.

The bare outlines of Ricardo's life are described in two brief memoirs—stilted estimates of his work rather than detailed accounts of his life. The first, an "Account of the Life of Mr. Ricardo" published in the "Annual Biography and Obituary for 1824" is ascribed by McCulloch to a brother. The second, from McCulloch's own pen, is a sketch of the "Life and Writings of Mr. Ricardo," prepared for and prefixed to the well-known edition of the "Works" and reprinted on several occasions thereafter. From the three men who perhaps knew Ricardo best—James Mill, Malthus and Hutches Trower—inconsiderable details of his life have come to us, and it is only by piecing together incidental references and scattered allusions in supplement of the unconscious testimony of his own later correspondence that any consecutive account of personal activity and mental history can be given.

So reconstructed, the life of David Ricardo falls naturally into four periods. The first phase, from 1772 to 1799 covers the years of his childhood, youth and early manhood, summarized in a budding career on the Stock Exchange and terminating with his initial acquaintance with the

"Wealth of Nations." In the second period, the decade from 1799 to 1809, Ricardo rose into material affluence and business leadership, and at the same time acquired a manner of economic self-education that culminated in his debut as a currency controversialist. Another decade, from 1809 to 1819, represents his productive period as an economist; in it appeared practically everything that he wrote of enduring value. The last four years of his life, from 1819 to 1823 are absorbed by an active career as publicist in the House of Commons.

The Ricardo family were originally among the great body of Spanish and Portuguese Jews of wealth and position, who, formally expelled from the Iberian peninsula by the intolerance of the "two-faced year," remained there in secret profession of faith as Marranos or Crypto-Jews. It is to this effective concealment that we doubtless owe the tradition that the founder of the house was an Andalusian grandee, who in the middle of the seventeenth century married a Jewess by whom he had five sons, three of whom became Jews and adopted the prenomens of Israel to distinguish them from the remaining two.¹ When the heightened rigor of the Inquisition made Marranism an increasing peril, and the edict of expulsion was repeated in the Papal States, insecure refuge was sought in the city republics of Italy. The Ricardo family appear to have lived in Livorno in the third quarter of the seventeenth century and probably settled there about 1660. A genealogical tree, now in possession of the main stem of the family in Amsterdam, describes one Benjamin Israel Ricardo (1667-1727) as of Livorno, and records the marriage in 1692 of his elder brother, David Israel Ricardo (1652-1721) to Estrela de Joseph Amadios of the same place.

Toward the end of the seventeenth century, however, the status of the Jews in Italy became increasingly unfavorable, and thenceforth it was in Holland that an abiding place for

¹ Letter of Joseph I. Ricardo in *Jewish Chronicle* (London), November 15, 1895, setting forth "facts which I have gathered from my family's papers."

the foot-sore people was sought. Received with scant welcome, tolerance quickly developed into hospitality, until by the dawn of the eighteenth century the Jewish community of Amsterdam had become the wealthiest, the most influential and the most cultivated in Europe. Its members controlled the Spanish and Portuguese trade and exercised an important influence in the development of commercial relations with the Levant and the New World. Their command of bullion was extraordinary and their interest in shipping considerable.¹

Drawn in this current, the Ricardo family removed from Livorno and settled in Amsterdam in the early years of the eighteenth century. The name is not found in the list of members of the Jewish congregation of Amsterdam in 1675, nor is it included among those who contributed to the construction of the synagogue in that year.² On the other hand we have record, as noted above, of the marriage of a member of the family, David Israel Ricardo, to an Italian Jewess as late as 1692. Two sons were born of this union, Samuel Israel Ricardo and Joseph Israel Ricardo, the latter the grandfather of the economist, whose birth in 1702 apparently in Amsterdam, indicates more or less approximately, the date of settlement of the family in Holland. Joseph Ricardo is said to have gone to Spain and returned with a wife, from the house of Treves.³ But upon her death Joseph married Hanna Abas in 1727, was blessed with four sons and two daughters, of whom the youngest son, Abraham Ricardo, born in 1750, was the economist's father.

In Amsterdam the Ricardos were dignified and substantial members of the Jewish community. The name of the economist's uncle, David Israel Ricardo (1720-1778) is

¹ Lucian Wolf (ed.), *Menasseh ben Israel's Mission to Oliver Cromwell* (1901), Introduction, xxx.

² D. H. Castro, *De Synagoge der Port. Isr. gemeente te Amsterdam, 1675-1875* (The Hague, 1875). For this reference and for other valuable material relating to the early Ricardo family I am indebted to the courtesy of Baron George von Rosenthal and to Mr. J. Hillesum, the learned librarian of the University Library, Amsterdam.

³ *Jewish Chronicle* (London), November 15, 1895.

found among the officers or "administradores" of two communal organizations in 1766-1770,¹ and in the list of subscribers to the prayer book, edited by Isaac de Sousa Britto in Amsterdam in 1772.² Intermarriages took place between the Ricardo and the Lobatto and the DaCosta families, the fruit of such unions including the mathematician Rehuel Lobatto and the poet and author Isaac DaCosta.³

The commercial supremacy of Holland had begun to decline with the passage of the English Navigation Act in 1660. Aimed directly at the Dutch, this measure affected no one class so injuriously as the Jewish merchants of Amsterdam, then largely engaged in trade with Jamaica and Barbados. A movement for the transference of Jewish counting-houses from Amsterdam to London set in and continued progressively through the eighteenth century. In this tendency, religious tolerance figured no less prominently than economic opportunity. The "increasing Hebraism" of English religious thought, as represented by the Puritan movement, the "philo-Semitic sentiment" of the Commonwealth, and finally the far-sighted economic policies of Cromwell inclining him "to consider the utility of his subjects even before he weighed their orthodoxy"—contributed to make conditions favorable for the return of the Jews to England, for the first time since their formal expulsion by Edward I. in 1290. In 1654 occurred the dignified and pathetic endeavor of Menassah ben Israel—a leader of the Amsterdam Jewish community—to secure formal admission for his people. Failing in its full purpose, enough was accomplished for the King in Council in 1664 to disavow a scheme to expel the Jews and to assure them, "that they may

¹ "Beth Ahaim" in 1766, and "Gabaim de Terra Santa y Cautivos" in 1770.

² Orden de las oraciones cotidianas en Hebraico y Romance—por orden del Ishac de Sousa Britto, ein Amsterdam 5532 (1772).

³ See *La Grande Encyclopedie* (ed. Berthelot) and *The Jewish Encyclopedia*, sub nom. As early as February, 1673, the municipal archives of Amsterdam record the birth of a child Abigail, to Rehuel Cohen Lobatto and Rebecca Israel Ricardo. The mother of Isaac Da Costa, the poet, was Rebecca Ricardo a first cousin of David Ricardo; see below page 31.

promise themselves the effects of the same favour as formerly they have had so long as they demean themselves peaceably and quietly with due obedience to his Majesty's laws and without scandal to his Government."¹

Thus in much the manner and for much the same reasons that the Jewish merchants and financiers of the Italian cities had removed to Amsterdam in the seventeenth century, a further transfer from Amsterdam to London took place in the eighteenth century.

In this movement the Ricardo family again participated. Their arrival in London seems to have occurred early in the decade from 1760 to 1770. In the list of the Bevis Marks Synagogue Israel Ricardo, probably an uncle of the economist, is mentioned in 1764.² With respect to Abraham Israel Ricardo, the economist's father, we are simply told with evident inexactness that he "came over on a visit to this country, when young, and preferring it to his own, became naturalized and settled here."³ Abraham Ricardo was born in 1750 and his application for denization was made in 1770, in which connection he spoke of himself as having 'for some years past lived in Great Britain.' It is reasonable to suppose that his arrival in London occurred therefore not later than 1764, while a lad of fourteen.

Young Abraham Ricardo readily found economic foothold in London. As a Jew he could not become a freeman of the City, nor legally transact business as an ordinary broker in the Royal Exchange where alone wholesale trade might be carried on, nor even, in the strict interpretation of City laws, open a shop nor trade permanently within its boundaries. But the Corporation was discreet enough not to attempt the rigid enforcement of its own regulations, and at all times in the ward of Portsoken which had grown to be "a place of privilege for merchant strangers," and without doubt, from time to time, in other parts of the City,

¹ Wolf, *op. cit.*, Introduction, lxxiv.

² Gaster, "History of the Ancient Synagogue of the Spanish and Portuguese Jews" (1901), p. 146.

³ Annual Biography and Obituary for 1824.

free play was given to Jewish enterprise.¹ As a matter of fact, the Jewish merchant-capitalists of the metropolis in the latter part of the eighteenth century were a wealthy and adventurous class, and opportunity was not wanting for a lad of parts.

After the Jewish manner, young Ricardo married, while still a mere youth, and through his wife, Abigail del Valle, became allied to one of the oldest and most powerful Sephardic families. His early course directed and aided by influential connections, Abraham Ricardo, thanks to energy, frugality and no small degree of native ability, was soon established as a prosperous merchant and broker.

In civil status he shared the more or less clearly recognized position which the Jewish community of London had attained. The repeal of the Naturalization Act of 1753 had in turn been followed by some popular pro-Jewish reaction in which if legal right remained unimproved, actual conditions of protection and encouragement were confirmed and strengthened. But in 1770—in anticipation of his majority—Abraham Ricardo petitioned the Crown in association with Abraham Buzaglo, Alexander and Assur Keyser, Isaac Mendes Furtado, Benjamin Lara and Simon Daniels—all men of position in the community—for letters of denization, and in the following year the royal patent was granted.² The patent of denization fortified the favor accorded an economically useful alien by bringing to his household not only security of domicile but many of the most grateful privileges of a natural-born British subject, including the right to institute and maintain legal proceedings and to acquire

¹ Lucien Wolf, *The First Stage of Anglo-Jewish Emancipation*—a paper read at a meeting of the Jewish Historical Society on June 22, 1903, and published in the *Jewish Chronicle* (London) of August 7, 1903. I am indebted to Mr. Wolf's encyclopedic knowledge of Anglo-Jewish history for many valuable suggestions.

² The petition is to be found in the Public Record Office, in "Petitions" (Home Office Papers), Series II, vol. 3, pp. 203, 207; for the warrant, see "Warrant Book, 1770-1773," vol. 33, p. 126, and for the patent itself, "Patents 11 Geo. III, Fifth Part," No. 17.

and alienate property "freely, quietly, entirely and peaceably."¹

The young emigré's affairs continued to prosper so that when the Corporation began enforcing with some severity the ordinances against unlicensed brokers, he prepared to acquire one of the twelve transferable brokerships which ever since 1697 the Court of Alderman had allotted the Jewish community. But vacancies here were as infrequent as the privileges were valuable. From the admission of Hart Levy in December, 1769, no such opportunity seems to have presented itself until October 5, 1773, when Moses Alvarenga surrendered, and Abraham Ricardo acquired the coveted silver medal.² Thereafter for a decade, either from his abode, No. 1 Bury Street, St. Mary Ax—part residence, part counting room, to which he removed almost about the same time from the older house in Broad Street Buildings³—or from the "Jewes Walk," the recognized position in the Exchange, the southeastern corner under the colonnade, assigned the Jewish brokers in the same way as other corners and walks were severally allocated to other leading groups of the brokers' fraternity—Abraham Ricardo conducted his business as broker and merchant, accumulating no vast fortune but gaining a comfortable livelihood and winning increasing esteem and respect.

Maintaining ancestral traditions Abraham Ricardo identified himself closely with the interests of the Sephardic community. His unusual financial sagacity appears to have been recognized even in that body of astute men of affairs. By assessment, gift and bequest the congregational funds had attained considerable proportions, the income of which was expended in varied philanthropic activities while the principal was advanced in properly covered loans. In such transactions Abraham Ricardo served repeatedly as fiscal agent, and we are told that nearly every year a vote of thanks was

¹ Cf. Report of Royal Commission on Naturalization and Allegiance (1869), p. 8.

² Guild Hall Records, Rep. 177, fol. 400.

³ London Directory for 1772, and for 1773, sub nom.

awarded him by the congregational electors for the care and zeal with which he filled this office.¹ Further congregational dignities awaited him, and in 1784 his name appeared in the list of elders who signed the revised Escamoth or regulations governing the conduct of the synagogue.²

Abraham Ricardo's union was destined to be a full realization of the scriptural injunction, being blessed by "a very numerous family," of which David Ricardo, the third child was born on April 19, 1772. The economist's childhood was spent in a restricted world of civic security, material well-being, religious orthodoxy and social exclusion. Of the mother we know literally nothing. The economist's writings and correspondence contain not the slightest allusion to her, and we can only assume that some part of the gentle kindness and strong domesticity of his own nature were traceable to maternal influence. The father we can picture, like another

"Spanish Jew from Alicant . . .
With lustrous eyes, and olive skin,"

—in domestic relations, devoted and indulgent but exercising sway with the absolutism of a later day patriarch; in religious sympathy, a pillar of the synagogue and an unswerving adherent to the opinions and practices of his forefathers; in business affairs and personal conduct, insistent upon the most literal integrity.

Young David was from the first designed for the same financial career in which his father had attained success and position. With that end in view he was equipped with a practical common school education, at first in England. Later—while still "very young," as in the case of Isaac Disraeli—the lad was sent to Holland, and placed in the household of a senior uncle in Amsterdam.³ The motive was

¹ Picciotto, *Sketches of Anglo-Jewish History* (1875), p. 220.

² Gaster, *History of the Ancient Synagogue of the Spanish and Portuguese Jews*, p. 156.

³ Probably Samuel Israel Ricardo, whose wife was Rachel Pereira. Of the economist's other uncles, the eldest, after whom he was named, David Israel Ricardo, had died in 1778, and a third Moses Israel Ricardo was unmarried.

two-fold, first, that he might receive instruction at a school in that city of which his father entertained a high opinion, but even more that he might, in accordance with the custom still common among Jewish families engaged in international mercantile transactions, acquire in youth intimate acquaintance with the language and institutions of the country with which his father's business chiefly lay and with which his own might be expected to continue.

The rigid discipline of his childhood was not relaxed in Amsterdam. An unpublished letter written by Maria Edgeworth in 1822,¹ from London to some unknown correspondent describes a trivial but diverting episode either of this period or perhaps of an earlier² visit to Holland: "At breakfast this morning I was reminding Mr. Ricardo of his having begun to tell me some anecdotes of his early life during a walk we took in a wood at Gatcomb Park, when we were interrupted by a beautiful view which burst upon us at an opening through the trees.—I told him that I had always regretted this interruption and hated the prospect to which I had been obliged (to say) 'How beautiful!'—He was diverted and has promised me that I shall lose nothing by that prospect for that he will tell me his whole history—some day—I wish that day were come.—Speaking of the little incidents which make an impression in childhood and through life, he told me that he could never forget a circumstance that happened to him when he was nine years old about a pair of shoes. He was in Holland at the time at the Hague. He saw in a shop window a pair of shoes with a edging of fur to which he took a fancy, and he entreated that they might be bought for him. It was represented to him that he did not see exactly what sort of shoes they were and that they would not suit him. He persisted,

¹ Original in possession of Mrs. Frank Ricardo to whom the writer is indebted for many courtesies. Excerpts of Ricardo's correspondence with Miss Edgeworth were published in the *Economic Journal*, September, 1907.

² The doubt arises from the fact that in the above letter, Ricardo speaks of his presence in Holland "when he was nine years old," whereas in the Letters written during a Tour on the Continent he refers (p. 19) to being there "from the age of eleven to thirteen."

and they were bought upon condition that he should wear them. He found that they had wooden soles—and this made such a clatter upon the pavement that everybody turned to look at him as he walked, and instead of the fur shoes proving a gratification to his vanity, they became a daily mortification. He would have given anything to have got rid of them, but he had no others—and he says none but himself can conceive the pains he took to slide in walking so as to prevent the noise of his wooden soles from making the disgraceful clatter.”

David remained in Holland two years, being then brought back to London for a final year's schooling. We know virtually nothing of the lad's life in Holland. He returned to Amsterdam from time to time on business errands for his father; but the last of such visits was made while still a youth—and thereafter not until 1822, while making “the grand tour” with his family did he see Amsterdam again. Then he wrote, “Although I had not been in this town for more than thirty years I had no difficulty in finding my way, alone, about those places which had formerly been familiar to me,” and added reminiscently “I see this town again with great interest.” Not only scenes were revisited, but personal friendships were renewed: the various branches of the Ricardo family, Dr. Capadosa, the de Leons, the de Castros, the Teixieras, and most of all, Mrs. DaCosta who as Rebecca Ricardo had been his favorite cousin in his uncle's household, and who now, a recent widow and the mother of Isaac DaCosta, a gifted young poet, received with warm welcome the friend of her girlhood.¹

Ricardo's formal education may thus be said to have ended with his fourteenth year—his father thereafter employing him regularly in business affairs. In the considerable intervals of leisure which this occupation afforded, David was permitted, we are told, to have tutors for private instruction in such subjects as attracted him, and it is per-

¹ Letters written by David Ricardo during a Tour on the Continent (privately printed, Gloucester, 1891), pp. 17-22.

haps from this experience are to be dated the beginnings of his later interest in natural science—chemistry and geology—even his eager study of Shakespeare to which as Fonteyraud learned from members of his family in 1847 he was much devoted.¹ But such studies must have been, at best, desultory, and a few years later, when a taste for abstract reasoning had begun to show itself and philosophical works to attract his attention and to hold his interest, we learn from the same source, that home influence took the form of positive discouragement of what was regarded as useless and unprofitable speculation.²

The elder Ricardo's business activities had passed from trading in commodities to dealing in bills of exchange and public securities. For such transactions the Royal Exchange had gradually ceased to be the principal scene and, despite the efforts of the City, licensed brokers the principal agents. Assembling originally in the rotunda of the Bank of England, unlicensed dealers in stocks and shares had long before this begun to congregate in Exchange Alley. In 1762 a contemporary writer observed, "It is a general remark, that two thirds of the people, that are constant attenders at the books on the transfer days, and are known to be Jobbers, are not legal Brokers."³ In 1773 a section of the fraternity passed from Exchange Alley to Sweetings Alley, where a room was engaged and kept up by subscription. But the coffee houses of the vicinity—notably Garraway's and Jonathan's—were the real seats of the trade. In 1792 Abraham Ricardo's business address had changed from St. Mary Ax to Garraway's Coffee House, and some years before, in 1784, he transferred his brokership—too valuable an investment to be retained practically unproductive—to Isaac del Valle of 24 Fetherstone Street, City Road, a member of his wife's family.⁴

¹ Notice sur la vie et les écrits de David Ricardo (1847), xx.

² Annual Biography and Obituary for 1824.

³ Mortimer, *Every Man his own Broker* (5th edit., 1763), preface, ix; see also Francis, *Chronicles and Characters of the Stock Exchange* (1849), pp. 24–28 et passim.

⁴ Guild Hall Records, Rep. 188, fol. 270.

The business world into which young Ricardo as a mere lad was thrust was of a kind calculated to excite and develop the identical qualities of mind which later distinguished him—mental independence, sturdy self-reliance, keen analytical power, all combined with ready candor and singular open-mindedness. David enjoyed the entire confidence of his father in financial matters and was soon exercising powers of the fullest responsibility. His brother relates as illustrating the youth's early maturity that at sixteen, David was entrusted with the convoy of two younger members of the family to Holland, and that neither his father nor his mother "felt the smallest anxiety for the charge which was confided to him."¹

It was perhaps inevitable with the larger business responsibilities devolving upon the son and the frequent necessity for exercising quick, independent judgment, that there should come, sooner or later, conflict with the patriarchal sway and the intellectual orthodoxy of the father. Whether preceded or not by a series of differences as to business affairs or political opinions, the critical rupture arose from religious non-conformity. Abraham Ricardo was a pillar of the Spanish and Portuguese Synagogue, and as literal in Jewish belief as he was zealous in ritual practice. Moreover he exacted of his children the same implicit faith as his own in the opinions of his forefathers in matters of religion, of politics and of education. We have no means of knowing to what extent, if at all, young Ricardo figured in the religious and communal life of the synagogue. It was probably little more than a passive association inspired by filial devotion and chilled by the rigid formalism into which the Sephardic service had passed. But the parting of the ways came only with David's attachment to a young Quakeress, Priscilla Ann Wilkinson, a daughter of Edward Wilkinson, Esq. The father raged, for to the Sephardic Jew a son marrying outside of the faith was as one whose name passed out of the family circle and for whom the

¹Annual Register and Obituary for 1824.

memorial prayer for the dead was recited. But David remained unmoved, and soon after attaining his majority in 1793, the marriage occurred, and with it separation from his father's house both in business and personal affairs. Contrary to the paternal monition, Ricardo's marriage was destined to bring complete happiness. "Mrs. Ricardo, brilliant eyes and such cordial open-hearted benevolence of manner, no affectation, no thought about herself"—was Maria Edgeworth's characteristically effusive sentiment. But the incidental testimony of Ricardo's correspondence, and notably that of the "continental tour" warrant more sober estimate of charm and devotion.¹

McCulloch tells us that before this event young Ricardo had actually seceded from the Jewish faith, but I can find no evidence of this and family estrangement and communal ostracism more likely characterize what really occurred.² Indeed McCulloch himself states that coincident with the sharpest difference of opinion David "never failed to testify the sincerest affection and respect for his father," and we know that in later life his relations with members of his family were close and intimate.³ But between father and son nothing in the nature of a reconciliation was ever effected. Like the faith itself to which he gave such full measure of allegiance, it was Abraham Ricardo's tragic lot to rear up many children only to have them leave him spiritually at maturity. He continued for many years

¹ Hare (ed.), *Life and Letters of Maria Edgeworth* (1895), vol. ii, p. 380; in an editor's note, Mrs. Ricardo is confused with her daughter-in-law (Catherine, daughter of W. T. St. Quentin of Seampston Hall, Yorkshire), whose marriage to the economist's eldest son, David, took place on June 1, 1824 (see *Gentleman's Magazine*, vol. 94, p. 636).

² Ricardo must, however, in 1819 as a member of Parliament have taken the oath of allegiance 'on the true faith of a Christian'; see the sketch of David Ricardo by the present writer, contributed to *The Jewish Encyclopedia*.

³ During his life-time Ricardo made regular allowances to certain less prosperous members of his family in England and Holland, and these were continued in the form of annuities after his death. His will also provided for small bequests to all of his surviving brothers and sisters—as well as to Malthus and James Mill—and one brother, Francis Ricardo, was made an executor of his estate.

quietly practising his business at Garraway's and later in Capel Court, seeing sons and daughters pass, some by marriage, others by apostasy, out of the synagogue into the larger world.

David's rupture with his father was followed by several years of grave anxiety. With limited resources of his own, weighted with new domestic responsibilities, the transition from affluence to self-dependence was critically abrupt. In this juncture three elements contributed to favorable issue—on 'Change the family name Ricardo had long stood for the highest honor and integrity; further, young David's own qualities of mind and character were known and respected; finally, the circumstances under which he had left his father's roof were well understood, and excited, if anything, a certain sympathy for the young recalcitrant. A number of the most substantial of his father's associates were quick in extending encouragement and support, and David was launched upon an independent career as stockbroker with, as his brother records, "the fairest prospect of success."

The time was favorable for intelligent financial venture and exchange operations. Repeating his father's success of a generation before David profited by these opportunities beyond all expectation. Within a few years, probably before he was twenty-six, he had secured for himself economic independence.

The problem of material cares disposed of, Ricardo allowed himself some relaxation from intent business activity. In part following an inclination of his boyhood, in part through the example and urging of a friend "with whom he was then very intimate," the young stockbroker devoted a part of his leisure to the popular branches of natural science—mathematics, chemistry, geology, and mineralogy. Many years later his sister told of having been invited as a child to witness some of the electrical experiments which Ricardo conducted with all the naïve pride of an amateur physicist; and Fonteyraud, and after him Garnier state, perhaps upon the same authority, that he was

one of the first to introduce illuminating gas in his residence.¹ But even more than chemistry, geology and in particular mineralogy attracted Ricardo's attention, and either at this time, or a little later, he fitted up a laboratory and formed a collection of minerals. The beginnings of modern geological study in England are curiously associated with the Society of Friends, and it is possible that Ricardo may have been drawn into this coterie through his wife's connections.² He does not appear to have been a member of the Askesian Society founded in 1796 nor of the British Mineralogical Society organized in 1799. But a few years later these two organizations first merged and then reappeared as the Geological Society, a kind of semi-scientific club, formed by thirteen men dining together at the Freemasons' Tavern on November 13, 1807, and meeting in a similar way once a month thereafter. Ricardo, although not one of the original thirteen, became a member of the Society in 1808, and continued more or less actively interested in its affairs until his death.³

The history of science presents more than one example of an almost accidental circumstance being responsible for the original interest of a master mind in the particular subject matter with which it was thereafter to be conspicuously identified. Certainly, casual episode was responsible for Ricardo's attraction to formal economic study. The "Annual Obituary" memoir refers to the circumstance, and McCulloch repeats the story. But the more direct and graphic

¹ Fonteyraud, *Notice sur la vie et les écrits de David Ricardo*, xix; Garnier, "Ricardo," in *Dictionnaire de l'économie politique* (ed. Coquelin et Guillaumin).

² It is at least worth noting that one Charles Wilkinson joined the Geological Society in 1808, the year of Ricardo's election thereto; see Woodward, *History of the Geological Society of London* (1907), p. 271.

³ Woodward, *op. cit.*; Ricardo was elected a member of the Society in 1808 (p. 271), the same year in which Dr. Marcet, Leonard Horner, William Jacob and Henry Warburton became members. He was named (p. 32) as one of the six "permanent trustees" appointed on April 6, 1810, and was placed (p. 33) on the newly constituted "Council" a few months later. He was again a member of the "Council" in 1815-16. There is no record (p. 33) of any paper contributed by Ricardo to the Society's proceedings.

version is Hobhouse's: "March 2, [1822]. Dined with Lambton—an immense party and splendid dinner. I sat next to Ricardo, who told me that he never thought of political economy till happening one day, during an illness of his wife, to be at Bath, he saw an Adam Smith in a circulating library, and turning over a page or two ordered it to be sent to his house. He liked it so much as to acquire a taste for the study."¹

We can well understand that as a substantial, well informed man of affairs, Ricardo's attention must have been arrested by the remarkable economic events that were transpiring about him. Even a mind less favorably endowed or an experience less admirably equipped would have been tempted to inquire as to the cause and extent of such conspicuous phenomena as the rise in general prices, the fluctuations in foreign exchange, and the perplexing interrelations of rents and profits. It is not to be doubted that Ricardo early entertained intelligent views on these subjects; but at best they were independent and detached opinions differing only in degree of intimacy from the sentiments which so thoughtful an observer would have formed upon current social and political conditions. There was need of a determining impulse which should both definitely engage his intellect in economic speculation, and at the same time supply the positive structure to which an essentially critical mind should attach, either in affirmation or dissent, its own views. This impulse came in the form of acquaintance with Adam Smith's work. We are told that Ricardo was from the very first highly gratified by its perusal, and that the inquiries with which it is concerned continued thenceforth to engage a considerable share of his time. The story may be apocryphal, although there is no reason for assuming this; in any event the fact is unessential. It is

¹ Lord Broughton, *Recollections of a Long Life* (1909), vol. ii, p. 179. "C'est, dans des proportions restreintes, l'histoire du bain d'Archimède, de la pomme de Newton, de la lampe de Torricelli, du piston de Watt, l'histoire, en un mot, de tous les germs intellectuels qu'un éclair féconde" (Fonteyraud, "Notice sur la vie et les écrits de David Ricardo," xxi).

enough to know that in the very prime of his mental powers, when a material career had already been achieved Ricardo's attention was definitely drawn to economic speculation by attentive reading of an economic treatise.

V In the decade from 1799 to 1809 Ricardo passed from the position of a substantial stockbroker to that of a wealthy and influential figure in the English financial world. This progress, like his earlier material advance, may be ascribed to an unusual coincidence of capacity and opportunity. Even more than the last years of the eighteenth century, the first decade of the nineteenth century offered exceptional rewards for first rate financial ability and unusual speculative talent. Market values fluctuated wildly with the events and rumors of the Napoleonic struggle, and early information or sagacious forecast reaped large gains. The unintelligent policy of the Bank in regard to note issues, pursued under cover of the Restriction, resulted in violent variation in the foreign exchanges and in the premium on gold, and the Continental blockade and a succession of deficient crops caused startling changes in the prices of provisions and commodities. Ricardo was a member of the governing 'Committee for General Purposes' of the Stock Exchange at least as early as February, 1802, when meetings were still held in Antwerp Tavern. He does not appear to have been a member of the Committee elected for the year commencing March, 1802, but instead to have served on the 'Committee for General Purposes' consisting of nine promoters and twenty-one other members formed to arrange the transfer of the old meeting room to the new Stock Exchange.¹

But it was probably less as a mere broker or independent speculator than as one of the new and important group of "loan contractors" associated with Pitt's bold financial policy that Ricardo rose into financial prominence. In the early years of the funding system the method of open public

¹ Records of the Stock Exchange (MS.). The Secretary of the Stock Exchange, Edward Satterthwaite, Esq., has courteously supplied helpful information.

subscription at fixed terms had been employed, the lists being exposed originally at the Exchequer and after 1714 at the Bank of England. But with the rapid succession of large loans and the wide fluctuations in public credit, the Chancellor of the Exchequer was obliged to abandon public subscription for a more certain procedure—the prototype of modern syndicate underwriting described in 1817 as already in vogue for a considerable number of years—whereby “The Chancellor of the Exchequer is generally attended, at the time appointed, by several of the principal bankers in London, who deliver their offers, having previously made up a list of persons who are willing to share with them to a certain extent, in case their offer be accepted; and the loan is assigned to the offerer who proposes the lowest terms.”¹

At first a prominent figure in the participating groups, Ricardo ultimately became one of this powerful class of “loan contractors.” In 1813 we find him replying to an inquiry: “The present loan will be divided amongst the subscribers to the last in the exact proportion of their former subscriptions. It will not therefore be in my power to comply with the request contained in your letter.”² Some years later Ricardo’s name figures in ‘Change gossip with Nathan Myer Rothschild’s, already the dominant figure in the English financial world.³

Ricardo’s financial activities were distinguished not only by the integrity and fidelity requisite to successful conduct of such operations, but by a certain larger spirit which even at the time attracted attention. Some evidence of this is contained in Pascoe Grenfell’s speech of May 13, 1819, upon Vansittart’s financial operations, wherein Grenfell declared that in 1814 the Chancellor of the Exchequer “had stated in

¹ Hamilton, *Inquiry concerning the National Debt*, pp. 310–311.

² David Ricardo to John Robins, Esq. (November 12, 1813; MS. in possession of the present writer).

³ “Three Expresses are arrived, but the contents of the despatches are not known—one was for Mr. Rothschild, and another for Mr. Ricardo who was at Lambeth” (*The Traveller*, London, January 30, 1822. It is barely possible, of course, that one of the economist’s brothers may be here referred to).

his place, that, having conferred with a number of gentlemen contracting for the loan with regard to the propriety of acting on his (Mr. Grenfell's) suggestion, they all, with one exception only, signified their disapprobation of it, and recommended a loan of £24,000,000 instead of £12,000,000. The exception to which he alluded was that of his honourable friend (Mr. Ricardo), who, greatly to his credit, observed to the chancellor of the exchequer, that if he considered his own interest merely, he must agree with his brother contractors; but if he were to consult the advantage of the country, he should advise the application of the sinking fund, and a loan of £12,000,000 only." Ricardo's comment upon this, also made upon the floor of the House, was characteristic,—“He had certainly then given the opinion which he had long entertained. He should have shrunk into the earth before those who had long known his sentiments if he had given any other; but he knew that those gentlemen who gave a contrary opinion had given it just as conscientiously; for great and sincere differences of judgment on this subject existed in the city.”¹

✓ Notwithstanding the absorbing demands of business affairs, Ricardo's interest in economic study continued unabated and within a few years political economy had become a deliberately pursued avocation. His mind once having been drawn to economic analysis, the extraordinary course of public events, growing out of the Bank restriction and Napoleon's commercial policy, would of themselves have compelled deliberate attention. But more than this the notable succession of economic books and pamphlets that appeared in the first decade of the nineteenth century could not fail to sustain the interest in economic writing which careful reading of the “Wealth of Nations” had excited. In 1801 came Boyd's “Letter to Pitt;” in 1802, Thornton's “Paper Credit;” in 1803, the quarto edition of Malthus's “Essay,” Brougham's “Colonial Policy” and Lord King's

¹ Hansard, *Parliamentary Debates*, vol. xl, 352, 356; cited (in another connection) in Cannan, “Ricardo in Parliament,” *Economic Journal*, September, 1894.

"Bank Restriction"—the first two, in Francis Horner's opinion "a great deal for one year"¹; in 1804, Lauderdale's "Public Wealth," Parnell's "Currency in Ireland," and Foster's "Commercial Exchanges"; in 1805, Lord Liverpool's "Coins of the Realm," and Macpherson's "Annals of Commerce"; in 1807-8, Spence's "Britain Independent of Commerce," Mill's "Commerce Defended," Torrens's "Economists Refuted" and Chalmers's "National Resources."

Of importance too were the brilliant series of interpretative and critical papers contributed to the newly-founded *Edinburgh Review*, at first by Francis Horner—das Wunderkind of English public life during the first years of the nineteenth century—and later by James Mill. More than ten years later, Ricardo wrote to Hutches Trower: "I remember well the pleasure I felt, when I first discovered that you as well as myself were a great admirer of the work of Adam Smith and of the early articles on Political Economy which had appeared in the *Edinburgh Review*. Meeting as we did every day, these afforded us often an agreeable subject for half an hour's chat, when business did not engage us."²

Fairly launched on this process of economic self-education—perhaps, even, in consequence of it—Ricardo, in 1807 formed the acquaintance of James Mill, a contact destined to become in its intimacy and range the most important influence in his subsequent mental history and personal life. Five years before, Mill had come from Edinburgh to make "the aspiring Scotchman's venture upon London" and to seek in journalism and letters the distinction he had failed to win in theology.³ From stray contributor, to hack reviewer and translator, to editor of a short-lived "literary journal," Mill had attained if not literary fame, at least a certain repute among London publishers. While yet in Edinburgh he had, like so many other brilliant young men of the

¹ *Memoirs*, vol. i, p. 229.

² *Letters of David Ricardo to Trower and Others, 1811-1823* (ed. Bonar and Hollander, Oxford, 1899), pp. 45-46.

³ Bain, *James Mill* (1882), p. 35.

period, fallen under the spell of Dugald Stewart's eloquence, and had extended his study of the moral sciences not merely into politics and political economy, but also into law and jurisprudence. This equipment now stood him in good stead. A short tract on the corn law question in 1804 attracted no attention; but his economic reviews were read with considerable interest, and in 1806 the "History of British India" was projected.

A more favorable opportunity was afforded by the appearance of William Spence's "Britain Independent of Commerce" in 1807. Revamping the central doctrine of the Physiocrats, Spence insisted that agriculture was the real source of England's strength and that there was nothing to fear from Napoleon's blockade. The message was congenial to a feverish public mind, Cobbett gave it approval and vogue in the *Political Register*, and the pamphlet went to a fourth edition within a few months. To Mill, as independently to Dr. Chalmers and Col. Torrens, the argument seemed false and the conclusion dangerous enough to invite rejoinder, and within the year (1807) Mill wrote "Commerce Defended"—"an answer to the arguments by which Mr. Spence, Mr. Cobbett and others have attempted to prove that commerce is not a source of natural wealth." A pamphlet of one hundred and fifty pages, the performance does not figure large in the history of economic writing. With a certain filial piety John Stuart Mill pointed out that it entitled its author to share with J. B. Say the credit of refuting the fallacy of a possible general over-production of commodities. But even by this advocate its larger claim to distinction was set forth as: "the first of his writings which attained any celebrity, and which he prized more as having been his first introduction to the friendship of David Ricardo, the most valued and most intimate friendship of his life."¹

The incident, it is true, is not confirmed by John Stuart

¹ J. S. Mill, *Principles of Political Economy* (1848), Bk. III, chap. xiv, § 4.

Mill in his "Autobiography," and Bain, James Mill's biographer, states categorically although without citation of authority that Mill's acquaintance with Ricardo began in 1811, probably through Bentham.¹ But this latter part of the statement is clearly inaccurate in as much as we know with certainty that Ricardo met Bentham through Mill, and not Mill through Bentham,² and on the whole there is no sufficient reason for discrediting John Stuart's explicit declaration in the "Principles."

Where or through what intermediary the introduction took place we are not informed. Ricardo, like Bentham, probably read "Commerce Defended," was gratified by its logical refutation of plausible sophistry and attracted by its wider interest in economic argument. So disposed it would not have been difficult for the well-established man of affairs to have made the acquaintance of the still struggling reviewer and pamphleteer. Closer acquaintance and mutual regard—centering about a common interest in economic discussion—followed promptly upon first contact. In this Mill assumed naturally the rôle of expositor and Ricardo sat docile at the feet of Gamaliel.

But events were rapidly tending to a point where Ricardo's peculiarly favorable equipment came into vantage. The spring of 1808 ushered in a highly speculative period of English commercial activity, marked by the usual incidents of credit expansion and price fluctuations. The Bank of England increased its issues steadily, the total circulation swelling from £17,467,170 in November, 1808, to £18,646,880 in May, 1809, to £19,811,330 in August, 1809. The Hamburg exchange fell from 30s. 8d. in January, 1809, to 27s. 8d. in December, 1809, and the price of gold bullion fluctuated from £4 9s. to £4 12s. per oz.—the market price at £4 10s. being about 15½ per cent. above the Mint price.³

¹ James Mill, p. 74.

² Letters of Ricardo to Trower, p. 1.

³ Report, together with minutes of evidence, and accounts from the Select Committee on the High Price of Gold Bullion (1810), pp. 1, 189, 207.

In October, 1808, Mill contributed to the *Edinburgh Review* a notice of Thomas Smith's "Money and Exchange." The article is interesting as an exhibit of the entering spirit of speculative method and argument into economic writing; as a contribution to monetary discussion it is ~~crass~~ in manner and with respect to the conspicuous phenomena of the moment, the fall in the exchanges and the premium on gold, it is reactionary in content. Ricardo, alert reader of the *Edinburgh*, could not fail to have had his attention arrested by the flabby uncertainty and wavering agnosticism of Mill's review—the more defective in face of a sharp rise in the gold premium and an abrupt fall in the foreign exchanges. Dissent would naturally be embodied in a brief memorandum submitted in the first instance to Mill and perhaps even prepared at his urging. The contribution was promptly brought to the attention of Perry, the proprietor-editor of the *Morning Chronicle*, probably again at the instance of Mill whose contact with the editorial rooms of the *Chronicle* dated from a letter of introduction from Thomson to Spankie presented at the time of his first arrival in London seven years before.¹ Not without some coaxing and with much trepidation Ricardo was induced to make public his views. The contribution appeared in the *Chronicle* of August 29, 1809, as a brief paper or essay, without signature, under the caption "The Price of Gold"—and with it Ricardo may be said to have entered formally upon his career as a political economist.

The ten years from 1810 to 1819 are the period of Ricardo's essential productivity as critic and author. Even such of his writings as were issued subsequent to 1819 had their inception and, in some cases, their partial expression before. It is hardly too much to say that had he done nothing after 1819 his influence upon the development of the science would have been virtually the same.

The decade opens with Ricardo engrossed in what was

¹ Bain, James Mill, p. 43.

soon to broaden into the "bullion controversy." The first *Chronicle* contribution was sharply assailed, among other less serious critics, by one writer under the pseudonym "A Friend to Bank Notes but no Bank Director," whose substantial manner and unconvincing argument invited reply. Accordingly, on September 20, appeared a second communication from Ricardo, formally addressed "To the Editor of the *Morning Chronicle*," and bearing the signature "R." Further discussion resulted, including a second letter from "A Friend to Bank Notes" whom subsequent events disclosed as Ricardo's friend and associate, Hutches Trower—if anything more vigorous in tone and more vulnerable in content than the first. An effective rejoinder by Ricardo appeared in the *Chronicle* of November 23, evidently marking the exhaustion of editorial patience, for with it the controversy terminated, as far at least as the columns of the newspaper were concerned.¹

If not exciting much attention, the discussion served at any rate to arouse the prime contributor and to suggest to Ricardo the desirability of presenting his developed views upon the currency situation in more consecutive form. The "High Price of Bullion" was actually published by John Murray as a thin, loosely-printed pamphlet of some forty-eight pages, probably at the very beginning of 1810; but the "Introduction" was dated December 1, 1809, the day following the appearance of Ricardo's third *Chronicle* contribution, and the pamphlet itself suggests composition, if not at different stages, at least under different influences.

An immediate and impressive consequence of Ricardo's essay was the parliamentary activity of Francis Horner and the series of events leading up to the appointment of the Bullion Committee. To what extent, if any, Horner's thought and conduct were directly influenced by Ricardo

¹ Ricardo's *Chronicle* contributions have been reprinted and the accompanying controversy summarized by the present writer in *Three Letters on the Price of Gold*, contributed to *The Morning Chronicle* in August–November, 1809, by David Ricardo (1903: "A Reprint of Economic Tracts").

affords interesting ground for speculation. The two men were probably friends and in frequent personal and social intercourse. Horner's interest in currency affairs antedated, and, not unlikely, stimulated and affected Ricardo's. But Horner's interest was critical and occasional rather than positive and sustained. There is no evidence that the currency developments of 1808-10 received more than his general attention, absorbed as he was in political life. On the other hand, when Ricardo's aggressive onslaught and definite program compelled public interest, they found in Horner not merely a ready convert, but an impatient and militant partisan.

In this "bullion controversy," or at least in that first phase of it which terminated on May 15, 1811, with the rejection of Horner's resolutions by the House of Commons and the adoption of Vansittart's counter-declaration that gold and paper were then of equal value—Ricardo figured as "the immediate cause of the parliamentary inquiry" and as the conspicuous champion of the bullionist contention. This title was definitely confirmed by the "Reply to Bosanquet" published in the closing months of 1810.

The positive influence of the "Reply to Bosanquet" was as pronounced as its intrinsic excellence. Bosanquet, a man of affairs, a governor of the South Sea Company and an officer of the Bank of England, claimed to have written in behalf of practical men in general protest against the conclusions of so-called doctrinaires, and to have rested his case upon concrete and specific evidences. To have this evidence taken up seriatim—analyzed, dissected and disproved—was meeting the combatant upon his own field and defeating him with weapons of his own choice, and this was Ricardo's service.

By the spring of 1811, Ricardo had won general recognition as an acute thinker and influential writer on currency, and as the aggressive champion, if indeed not the original author of the bullionist creed. Of far greater importance to his later mental history than the resultant distinction was

acquaintance or closer association, growing out of it, with the active economic thinkers of the day.

Even before, the circle of Ricardo's acquaintance was wider in range and more catholic in composition than that of the ordinary man of affairs. At the Geological Society he had met devotees, both scientists and patrons, of natural science. Through Mill he had come in contact with well known journalists and reviewers. On the Stock Exchange he had gravitated to those of his associates, like Hutches Trower, interested in economic discussion, and in the course of public financiering, no less than by virtue of his own substantial position, he must have formed a considerable political acquaintance.

But with the disclosure of conspicuous ability as an economic thinker, aided by the distinction of successful authorship and the prestige of practical influence—Ricardo's social and intellectual relations passed beyond the limits which personal modesty and temperamental reserve had before imposed. Thereafter we find him in frequent contact and friendly association, often at his own hospitable board, with Malthus, Bentham, Place, Mackintosh, Thornton, the Horners, Whishaw, Hobhouse, Tooke, Warburton, Sharp, Lord Holland, Tennant, Dumont, Sydney Smith, and Joseph Hume.

The friendship with Malthus was the most important; and like the intimacy with Mill, it was destined to become a powerful influence in Ricardo's life. The "Essay on Population" had appeared in 1797, and within a few years, its author, although still the "best-abused man of the age," had attained conspicuous prominence in current economic discussion. His appointment as Professor of History and Political Economy at the newly established Haileybury College in 1805—probably the first academic recognition of the science in England proper—confirmed and dignified his status.¹ Ricardo had read the "Essay on Population" in its first edition and had found its doctrines "so clear and so

¹ Bonar, Malthus and his Work (1885), book v.

satisfactorily laid down that they excited an interest in me inferior only to that produced by Adam Smith's celebrated work."¹ Such acquaintance as may already have existed between the two men was doubtless heightened by Ricardo's public entry into the currency discussion, and as early as February, 1810, the two were in cordial association, this relation developing rapidly into friendship and intimacy.

Dr. Bonar, to whose sympathetic interpretation we are indebted for so clear a picture of Malthus, has said "it was the friendship of two men entirely unlike in mental character."² But this very fact is perhaps the real explanation of the intimacy. Their training, their vocations and their sympathies were complementary rather than opposed, and rare good-temper and forbearance in discussion, a common enthusiasm for economic analysis, and complete candor and disinterestedness in intercourse rendered the differences in equipment mutually stimulating and helpful.

Thenceforth, until the end, the two were in almost uninterrupted touch. Maria Edgeworth declared they "hunted together in search of Truth, and huzzaed when they found her, without caring who found her first," and added, "indeed, I have seen them both put their able hands to the windlass to drag her up from the bottom of that well in which she so strangely delights to dwell."³ It was Ricardo who supplied Malthus with technical details as to bullion and foreign exchange and Malthus who applauded or criticised Ricardo's opinions. Hertford was no great journey from London, and Ricardo's house in Mile End and later in Upper Brook Street was Malthus's stopping place when affairs called him to the metropolis, just as Ricardo found welcome respite from the turmoil of the Stock Exchange in much-enjoyed week-end visits to Haileybury.

Through Malthus, Ricardo was drawn, first as a guest and later as a member, into the rare fellowship of the

¹ Letters of David Ricardo to Thomas Robert Malthus, 1810-1823 (ed. Bonar, Oxford, 1887), p. 107.

² *Ibid.*, Preface, viii.

³ Life and Letters of Maria Edgeworth, vol. ii, p. 668.

"King of Clubs," and later when Ricardo had established himself in a Gloucestershire country estate it was again Malthus through whom he became intimate with his neighbors, the Thomas Smiths of Easton Grey—the friends of John Whishaw, Sydney Smith, Hobhouse and the best Whig elements of the period.¹

The friendship with Malthus, and the correspondence growing out of it, were also responsible if not for Ricardo's continued interest in economic thought, at least for the particular bent which it took and the form in which it was expressed. It is not unlikely that contemporary events and notably the corn-law debates of 1813-14 would have independently impelled Ricardo to similar publication, but certainly the "Essay on the Low Price of Corn" published in the early months of 1815 was the direct outcome of correspondence with Malthus, as its sub-title "remarks on Mr. Malthus' two last publications" implies. So too Ricardo's next tract "Proposals for an Economical and Secure Currency," while directly provoked by Grenfell's parliamentary agitation for a revision of the Bank's privileges, had its genesis in the "Appendix" to the fourth edition of the "High Price of Bullion" prepared in reply to Malthus's strictures in the *Edinburgh Review*. It was Mill, to be sure, who from the appearance of the "Essay on the Low Price of Corn" in 1815 sought to induce Ricardo to present his views "from the beginning and at greater length" and in the actual arrangement and form of the "Principles of Political Economy and Taxation," issued in 1817, Mill's influence was doubtless paramount; but it was the running controversy with Malthus which perhaps more than anything else sustained Ricardo's interest and overcame the difficulties of arduous composition.

The reception accorded Ricardo's "Principles" while respectful was not enthusiastic. To the elect much of it

¹Lady Seymour, *The Pope of Holland House* (1906), *passim*. Mr. W. P. Courtney has contributed to the volume a charming account of the "King of Clubs," based upon the original minute book, now in the British Museum.

was heterodox; to the layman most of it was unintelligible.¹ Whether or not the fortune of the "Wealth of Nations" was made, as unconfirmed tradition has it, by Fox quoting therefrom in the House of Commons, certainly the "Principles of Political Economy and Taxation" acquired much of its early circulation from McCulloch's highly laudatory review in the *Edinburgh Review*.² Thereafter the book gained steadily in estimation. Before the end of 1819 a second edition had been called for, followed in 1821 by a third and final edition, to each of which Ricardo made significant additions and amendments.

The decade of authorship thus notable in its scientific aspect has a delightful counterpart in the record of personal activities and in the disclosure of genial and intimate character. The close of the Napoleonic struggle not only found Ricardo more active in economic composition, but preparing to realize the aspiration of every early nineteenth century man of business—retirement from active affairs for the placid ease and social dignity of a country gentleman's life. His fortune had grown rapidly with the abrupt financial events culminating in Waterloo. In 1812-13 the house in Mile End was exchanged for a west-end mansion in Upper Brook Street, Grosvenor Square, and in the spring of 1814 a beautiful estate in Gloucestershire—Gatcomb Park, near Minchin Hampton—was acquired. Ricardo like his friend, Hutches Trower, would probably in any event have embraced the opportunity offered by the sharp rise in public credit to convert his fortune from funded into landed property; but this impulse was doubtless hastened by increasing interest in economic study and by the hope of devoting undisturbed thought to such speculations. Some time elapsed before the reinvestment could be effected—indeed

¹ Sismondi records that Ricardo himself declared that "there were not more than twenty-five persons in England who had understood his book" (cf. Blanqui, *History of Political Economy in Europe*, Eng. trans., 1880, p. 460, note).

² June, 1818, Art. ii ("On Ricardo's *Principles of Political Economy and Taxation*").

not until 1819 did he relinquish membership in the Stock Exchange—and during this interval Ricardo gravitated back and forth with disturbing frequency. But by 1815 Gatcomb had become the abode and the Brook Street mansion, the town house for temporary sojourn during the spring and early summer months of the London season.

From the first Ricardo derived the keenest pleasure from country residence. "I believe that in this sweet place I shall not sigh after the Stock Exchange and its enjoyments," he wrote from Gatcomb Park to Malthus in July, 1814.¹ With the characteristic inexpertness of the city-bred was joined an almost child-like enjoyment of the pleasures of the country-side. Sydney Smith declared that "a new surgeon had set up in Minchin Hampton since Mr. Ricardo has taken to driving"—upon which Maria Edgeworth commented in prudent spirit, "but I prefer it to more dashing driving."²

Thenceforth we see Ricardo at closer range—warm-hearted and mild tempered, 'not only wise and good but agreeable,'³ devoted in his family relations, loving quiet and domestic life, gracious in his hospitality, winning new friends and holding old ones. His marriage had been blessed with a large family—three sons and five daughters—and the privately printed correspondence of his continental tour in 1822 suggests the warmth and intimacy of the home-tie, while Maria Edgeworth has left us a delightful picture of the everyday life at Gatcomb.⁴ Before his death three daughters and a son had married and been established at country estates within reach, and thenceforth the young households contested for parental visits, while at intervals, children and grandchildren were gathered in patriarch-like fashion under the Gatcomb roof.⁵ Occasional journeys

¹ Letters of Ricardo to Malthus, p. 37.

² Life and Letters of Maria Edgeworth, vol. ii, p. 380.

³ Ibid., vol. ii, p. 402.

⁴ Ibid., ii, pp. 379-384.

⁵ "It cannot be said"—wrote John Whishaw, "the Pope of Holland House" to Thomas Smith of Easton Grey in 1817—"that Mr. Ricardo has been improperly influenced as to the principles of popu-

were made to neighboring estates, sometimes by Ricardo alone, more often accompanied by Mrs. Ricardo—to the Smiths at Easton Grey, to Hutches Trower at Unsted Wood, to Malthus at Haileybury, to Bentham at Ford Abbey, to Holland House and to Bowood, and twice, in 1817 and again in 1822,¹ the continent was visited. But more often, friends and fellow economists—Malthus, Say, Mill, McCulloch, Whishaw, Maria Edgeworth, Sydney Smith, Hutches Trower—came to Gatcomb, for week-end visits or for longer sojourn, always leaving with regret and bearing testimony to English country house hospitality at its best.

A like social warmth radiated from the Upper Brook Street mansion. "Ricardo's breakfasts" were perhaps the real nucleus of the coterie whose common interest and personal regard culminated in the formation of the Political Economy Club in 1820, and made possible the phrase the "Ricardo School."² Young men in particular found welcome and encouragement, and George Grote and John Stuart Mill are but types, though conspicuous ones, of the value and stimulus of this contact.

With the "Principles" off his hands, in enjoyment of increasing recognition as an authoritative exponent of economic principles, free from the distractions of business cares and with abundant means to gratify his impulses—it was natural enough that Ricardo's close friends should have urged upon him a parliamentary career. There were what Ricardo remotely terms the "disagreeables attending the negociation" and the first efforts in June, 1818, were unsuccessful;³ but eight months later he took his seat for Portarlington, an Irish pocket borough of Queens County. Ricardo never saw his borough nor his constituents—a circumstance

lation, by his intimacy with Malthus. He will enjoy the blessing of Abraham, and may expect to see a tribe of grandchildren and great-grandchildren round his table" (Lady Seymour, *The Pope of Holland House* (1906), p. 180).

¹ During this tour, Ricardo met Dumont, Sismondi and the Duc de Broglie in Geneva, and J. B. Say, Louis Say and Destutt de Tracy in Paris.

² Torrens, *Corn Trade* (4th edit., 1827), p. 144.

³ Letters of Ricardo to Malthus, pp. 151-152.

which McCulloch naïvely notes had the advantage of enabling him to speak and vote without being influenced by their opinions.¹ It was generally known that Ricardo had entered parliament "by virtue of his breeches pocket" as Mrs. Grote records—the ingenious arrangement being that £20,000 should be lent to the proprietor of the Portarlington borough free of interest, on condition that the candidate was returned free of expense.² But the method was too familiar—indeed for one circumstanced as Ricardo inevitable—and the ability of the candidate too generally recognized to involve any discredit.³

There could be no more inviting task than to trace that parliamentary career. Mr. Cannan has with characteristic thoroughness summarized its activities as recorded in the pages of Hansard.⁴ But the "Parliamentary Debates" present after all a bloodless chronicle, and a glaringly defective one at that. Ricardo's relation to the inner political life of the House, his effective but impersonal service on important committees, his participation in public political discussion and his influence in the councils of Whigs and Radicals—yet remain to be told. For his time he was not only an active but a faithful member. Mr. Cannan has taken the pains to determine that "His speeches number 126, and though many of them are merely brief, casual remarks, occupy together 177 columns of Hansard. The Hansard of that

¹ Sketch of the Life and Writings of David Ricardo, Esq., M. P., in McCulloch, *Treatises and Essays*, etc. (2d ed., 1859), pp. 555-556, note; this note is omitted in the memoir of Ricardo prefixed to McCulloch's edition of Ricardo's Works.

² McCulloch is authority for this statement (*loc. cit.*). Spencer Walpole places the amount lent at "£40,000 or £50,000" (*History of England*, 2d edit., 1879, vol. i, p. 339), upon the strength of O'Connell's story in the House of Commons on March 8, 1831 (*Hansard*, 3rd series, vol. iii, p. 201).

³ *Personal Life of George Grote* (1873), p. 21. It was "borough-mongering," John Whishaw declared in 1817, that made possible under existing political conditions "the having in Parliament such men as Romilly, Horner, Mackintosh, Tierney, Brougham, &c., who could not easily have found seats, especially before they were known to the public, by any mode of popular election" (*Seymour, The Pope of Holland House*, p. 210).

⁴ "Ricardo in Parliament," in *Economic Journal*, June and September, 1894.

period seldom gives the list of the majority in parliamentary divisions, but from February 21, 1819, to September 10, 1823, there are 237 lists of minorities, and Ricardo's name occurs in 166 of them. It also occurs in eight out of the nine lists of majorities. That he voted in many of the majorities of which the names are not recorded is improbable, but even if he voted in none of them it is clear that he must have attended divisions most conscientiously."

We know that he spoke his mind plainly on all subjects within his range—not only currency, the Bank, taxation, funding, the sinking fund, agricultural depression, the tariff, but parliamentary reform, retrenchment, freedom of the press and right of public meeting. Dr. Bonar suggests that "His oratory seems in many respects to have resembled that of Cobden. The arguments were given with plain directness without elegance of diction; and they were brought home by matter-of-fact similes from every-day life or commercial experience."¹ As to his influence in the House of Commons, Brougham, by no means a blind admirer, declared, "Few men have, accordingly, had more weight in Parliament; certainly none who, finding but a very small body of his fellow-members to agree with his leading opinions, might be said generally to speak against the sense of his audience, ever commanded a more patient or even favorable hearing."²

Everything which Ricardo wrote after 1819 is directly associated with his parliamentary activity. The "Protection of Agriculture" is a manner of minority report of the Committee on Agricultural Distress of which he was a more or less dissenting member; the "Essay on the Funding System"—written under pressure for the "Supplement to the Encyclopedia Britannica" through Mill's and Macvey Napier's insistence—expounded the views on taxation and the national debt which Ricardo had repeatedly expressed on the floor of the House; the posthumous "Plan for the

¹ Letters of Ricardo to Malthus, Preface, x.

² Mr. Ricardo, in Historical Sketches of Statesmen in the time of George III.

Establishment of a National Bank" was an immediate sequel to strictures upon the Bank's conduct relative to the Resumption Act. The nearest approaches to doctrinal contributions in this period were the controversial letters to Malthus, Trower and McCulloch, the additional matter inserted in the third edition of the "Principles" and the lost "Notes on Malthus"—and these in so far as we have them are incidents rather than essentials of Ricardo's mental history.

The end came with almost tragic unexpectedness. Although never of robust health, and worn by the strain of parliamentary duties, the autumn of 1823 found Ricardo seemingly in the best of mood, in the midst of spirited controversy with Malthus and McCulloch as to the measure of value, and anticipating early visits to Gatcomb from Mill and Trower, when "we shall all enjoy ourselves together—we shall walk and ride, we will converse on politics, on Political Economy, and on Moral Philosophy, and neither of us will be the worse for the exercise of our colloquial powers."¹ Early in September he was, however, attacked with a pain in the ear. It was regarded as of no grave consequence and seemed to yield to simple treatment. A few days later the symptom reappeared in more acute form, inflammation developed and after some hours of the greatest suffering he died on September 12, 1823.

The remains of Ricardo were brought for interment from Gatcomb Park, his actual residence and the place of his death, to Hardenhuish Park near Chippenham, Wiltshire, the beautiful country seat of his daughter, Mrs. Clutterbuck. Recollections of the impressive solemnity of the great funeral cortege which wound over the Gloucestershire hills from Minchin Hampton to Chippenham lingered for many years in the vicinity.

The grave of the economist is marked by a massive monument, a square canopy supported by four pillars with four female figures grouped about a central column. It stands

¹ Letters of Ricardo to Trower, p. 211.

close by the tiny village chapel at the edge of Hardenhuish Park, and is inscribed: "To the Memory of David Ricardo, Esq., M.P." Within the chapel is a simple memorial tablet.¹

¹ An engraving by T. Hodgetts from a portrait painted by T. Phillips, R. A., was published by Colnaghi's in May, 1822, and is prefixed in reduced size to McCulloch's "new" edition of Ricardo's works. In the lower hall of Gatcomb Park is a marble bust of Ricardo by an unknown artist, showing an older and less placid face.

II

THE WORK

The life-work of David Ricardo as a political economist presents the dual aspect of theoretical contribution and practical service. A brilliant critic of the Ricardian economics has said that "Among all the delusions which prevail as to the history of English political economy there is none greater than the belief that the economics of the Ricardian school and period were of an almost wholly abstract and unpractical character."¹

No more convincing exhibit of the accuracy of this generalization could possibly be found than the activities of Ricardo himself. The traditional myth has been of a closet philosopher, making use neither of history nor statistics, whose doctrines "were chiefly, and, considered as a whole, deductive, and flowed naturally from a few hypotheses concerning human nature and the external physical world."² Here and there a more careful student of Ricardo's mental history, has recognized that "this 'father of the deductive method,' as he has been called, possessed a more vivid insight into certain industrial facts than many economists before or since."³ But in the main, Ricardo has been represented as a detached and incorporeal intelligence whose speculations stand unrelated to personal activities or to contemporary affairs.

This misconception has in part proceeded from, is in part responsible for the relative neglect of Ricardo's contributions to practical economics. His doctrines once regarded

¹ Cannan, *History of Theories of Production and Distribution* (1893), p. 383.

² Ely, *Past and Present of Political Economy*, in *Johns Hopkins University Studies in Historical and Political Science*, Second Series, No. iii, p. 10.

³ Rogers, "Ricardo," in *Palgrave's Dictionary of Political Economy*.

as abstract speculations, comparatively little interest attaches to his work as pamphleteer and publicist. Conversely, once disassociated from his positive work and influence as practical economist, Ricardo's economic doctrines become, naturally enough, metaphysical abstractions.

An examination of Ricardo's practical work as an economist, in contradistinction to his theoretical contribution, thus possesses a dual interest. It is essential to a proper understanding of that body of theory, and it is in itself an impressive exhibit of economic service.

Prior to 1809 Ricardo's interest in economic happenings is the intermittent attention of a well informed financier, standing in much the same relation to his later activities that the half-hour recess discussions with Hutches Trower over Adam Smith's doctrines do to his subsequent work as a theorist. But from the publication of the paper on "The Price of Gold" in the *Morning Chronicle* of August 29, 1809, Ricardo's contact with economic affairs is direct and sustained, and thenceforth his life as interpreted by his writings and correspondence is in no small degree a reflex of the stirring economic events of the period. Currency and the Bank of England, corn laws and agricultural distress, taxation and the national debt successively absorb his attention and it is to these, in turn, as the objects of Ricardo's thought and activity, that attention will be directed.

The currency question may be regarded as the centre of Ricardo's interest in economic affairs. An active experience in the money market at a time of extraordinary disturbance, supplemented by thoughtful study of economic writings, had developed intimate acquaintance with contemporary monetary events into intelligent grasp of monetary principles. His earliest publication was a contribution to current monetary discussion. The expansion of the *Chronicle* letters into the tract on the "High Price of Bullion" led to acquaintance with Malthus, to greater intimacy with James Mill, and to welcome within a small but active circle of economic thinkers.

With the appearance of the Bullion Report in the summer of 1810 the successful financier and well-informed man of affairs took rank in the public mind as an authoritative exponent of monetary theories. The "Reply to Bosanquet," afforded full scope to Ricardo's powers as a controversialist, and confirmed a reputation already definitely made. The "Proposals for an Economical and Secure Currency," restated a positive program for resumption that appealed to the public mind, and the "Principles of Political Economy and Taxation" presented in didactic form the views 'on currency and banks' then already become the creed of economic orthodoxy.

It is likely that the hope of hastening currency reform contributed largely to Ricardo's political aspirations. Certainly he entered parliament in February, 1819, at the very time that currency and resumption were the dominant issues. In the succeeding four years in which Ricardo sat in the House of Commons, there was probably no single discussion of currency matters in the course of which his voice was not lifted and his counsel not received with attention and respect, however opposed to the dominant views. Finally, as the currency question had dictated his initial so it inspired his final contribution to the study which he loved. The "Plan for a National Bank" was completed barely a month before Ricardo's death and was published in the following year as a posthumous tract.

But although sustained interest in currency affairs, indeed active participation in currency discussion, extended over the full span of Ricardo's scientific life, the immediate occasion of his thought and writing upon currency matters underwent successive change within that period.

At the outset, Ricardo took the field, at the instance of a journalist friend, to lend the weight of his name and the force of his argument to securing wider recognition for the contention, often before stated but relatively neglected or discredited, that the paper circulation of England was excessive and therefore depreciated, that this fact was evidenced

by two unfailing symptoms—a premium upon gold and a fall in the exchanges—and that the remedy lay in obliging the Bank to resume specie payments. In expanding his newspaper contributions into a formal pamphlet, Ricardo developed a brief argument upon a current issue—of note primarily because of the distinction of its authorship and the vigor of its contention—into a fairly comprehensive exposition of the theory of money in relation to pending problems. From the appointment of the Bullion Committee Ricardo's energies were absorbed in vindicating the bullionist position from the specific strictures of men-of-affairs on the one hand, and from the doctrinal attacks of theorists on the other hand. Theoretical exposition and controversial defence led naturally to a practical plan for resumption, and in the summer of 1811 Ricardo first outlined his proposal for bullion payments to be urged at intervals thereafter whenever the end of the restriction seemed in sight. With the definitive postponement of resumption and the beginning of agricultural unrest, Ricardo's attention turned from currency to corn laws, and when it reverted again thereto in 1815, the policy and practice of the Bank of England in relation to public and private interests had become the principal theme. With his entrance into Parliament the legislative aspects of the currency discussion—committees of inquiry, parliamentary debates, the actual form of resumption—held Ricardo's interest, either as critic or participant. Finally the virulent abuse of agricultural radicals and political demagogues as to the validity of his theories and as to the consequence of his proposals became the conspicuous fact in the closing years of Ricardo's life.

Ricardo's attitude upon corn law legislation and upon the nature and remedy of the acute agricultural distress, which characterized the years of his public career and formed the chief occasion of his parliamentary activity, was throughout eminently consistent. Even those who like Attwood differed with him the most and considered his opinions the most mischievous, imputed to them this virtue. As occa-

sion demanded, one phase or another of his exposition was emphasized; but his essential views underwent little change and were advanced upon every possible occasion at the expense of much reiteration in discussion and correspondence, and of more misrepresentation and abuse from without.¹

The effective cause of socio-economic distress, Ricardo believed, was the disproportion between capital and population. To some extent this insufficiency of capital was natural and inevitable. The population of England was increasing and the supply of land was limited. In consequence profits tended to fall and capital inclined to leave the country. But the desire to remain in one's country was strong and largely counteracted this latter evil. Indeed no serious harm would be wrought but for the fact that the natural tendencies to "the abduction of capital" were heightened in effect by the force of certain artificial ones. These were: (*a*) the corn laws, which enhanced the price of necessities, raised wages and reduced profits; (*b*) restraints upon trade, which operated as a drag upon industry and discouraged the influx of capital; (*c*) the national debt, of which the interest charge had become an intolerable burden and tended to drive capital from the country.

These several causes operated to produce general economic depression. The peculiar distress of agricultural interest was due to the added misfortune of a period of disastrously low prices, brought about by the extension of agriculture, the introduction of improvements, a succession of good harvests and heavy imports from Ireland. The agricultural situation was simply one of enormously increased supply with no corresponding vent. The passage of the act for the resumption of cash payments had effected a reduction of perhaps five per cent. in general prices and the subsequent unnecessary purchases of gold by the Bank had probably increased this to ten per cent. But beyond this the fall in the price of corn could not be explained as the

¹ Letters of Ricardo to McCulloch, Introduction.

effect of currency changes. Nor was taxation alone responsible. Certain charges, such as the poor-rate and the tithe, did bear exclusively upon the agricultural interest; but in the main taxation was a common burden and could not explain the distress of a particular class.

In so far as the distress of the agriculturist was peculiar, it was temporary and tended to work its own correction. Radical legislation was unnecessary and mischievous. On the other hand, no absolute or lasting improvement was possible as long as the conditions of general industrial depression remained unchanged. The remedial course to be pursued was then clear. The corn laws should be repealed, not immediately, nor entirely; but a gradual reduction should be made, extending over a term of years, until a mere countervailing duty, that is, a charge equivalent to the special burdens upon the agriculturist, was reached. Upon exportation a corresponding bounty should be allowed. Less productive capital would thus be withdrawn from agriculture and invested in more profitable industries. Profits would rise and capital would flow into the country. A similar stimulus to industry and consequent increase in available capital would result from the removal of all restraints upon trade, made gradually so as to provide, in so far as possible, for vested interests.

The beneficent effect of such changes Ricardo believed would be tremendously heightened by the extinction, wholly or in part, of the national debt. This could be accomplished by an assessment upon the general wealth of the country, upon fundholder as well as land owner, spread if necessary over a term of years and involving payment to the fundholder at the market value, not at the par value, of his securities. Thereafter, supplies for the year, in war as in peace, should always be raised by taxation without recourse to funding.

With respect to the national currency and the Bank of England, Ricardo inspired an aggressive minority and saw actually realized much of that for which he contended. In

the matter of corn laws and agricultural depression, he fought persistently for policies whose temporary rejection foreshadowed ultimate adoption. But in the case of taxation and funding—his third great concern as a practical economist—Ricardo's programme was radical and impracticable and its influence lay in exposing existing evils and in provoking intelligent debate rather than in direct achievement.

Modern discussion of the nature and validity of economic principles has centered largely about the theoretical contributions of Ricardo.¹ On the one hand, common cause has been made by the historical school and by the 'subjective' group of political economists in a vigorous reassertion of Jevons's unfavorable verdict. On the other hand, sturdy contention has come from other quarters as to the essential correctness of the Ricardian theories and with it demand for a radical reappréciation.

But this doctrinal debate has been waged with such heat that polemic endeavor has in no small degree replaced textual study. Fallacy hunting has been met by over-generous interpretation, hypercriticism has been answered by apology, and in intent concern upon establishing or overthrowing alleged errors, both critics and supporters have relatively neglected Ricardo's original exposition and the notable changes which that exposition underwent.

Moreover, students of the Ricardian economics have received by successive publication since 1887 an amount of Ricardo's informal writing hardly less in extent than the aggregate of his formal composition. Such an accession in the case of an economist of indistinct personality, profound thought, and unsystematic exposition could not fail to be productive of important results. The series of letters to

¹ See a paper by the present writer on "The Development of Ricardo's Theory of Value" in *Quarterly Journal of Economics*, August, 1904, of which free use has been made in the following pages.

Malthus,¹ McCulloch,² and Trower³ respectively and the privately printed correspondence of his continental tour,⁴ have not only modified the common estimate of Ricardo's personal character, in acquainting us for the first time with his every-day activity, but have corrected glaring misconceptions of certain of his fundamental doctrines. Even more notable than this, they have made it possible to follow the course of Ricardo's mental history as an economist, and to study with some exactness the evolution of his most characteristic theories. Something of this has already been done, but most of it still awaits cautious and precise interpretation.

There are three clearly defined phases in the development of Ricardo's economic system, corresponding here as throughout to the influences which shaped his mental history. The first began with acquaintance with systematic economic writing in 1799 and extended to the rent controversy of 1814-15, and might be described as consistent exposition of Adam Smith's theoretical concepts. The second phase was incident to the corn-law debates of 1813-17 and to informal discussions as to correlated economic policies, and found initial expression in the "Essay on the Influence of a High Price of Corn on the Profits of Stock," and full exposition in the first edition of the "Principles of Political Economy and Taxation." The third phase consisted in the main, of spirited controversy with friends and critics as to the correctness or adequacy of certain characteristic doctrines, and was still in progress at the time of Ricardo's death.

In inception, Ricardo's economic philosophy dated back to early critical reading of the "Wealth of Nations." Such

¹ Letters of David Ricardo to Thomas Robert Malthus, 1810-1823 (ed. Bonar, Oxford, 1887).

² Letters of David Ricardo to John Ramsay McCulloch, 1816-1823 (ed. Hollander, New York, 1895).

³ Letters of David Ricardo to Hutches Trower and Others, 1811-1823 (ed. Bonar and Hollander, Oxford, 1899).

⁴ Letters written by David Ricardo during a Tour on the Continent (privately printed, Gloucester, 1891).

views as he may have entertained before 1799 were the every-day opinions of a thoughtful man of affairs intimately acquainted with financial technique, and owing material success very largely to a signal ability to disassociate causes and trace effects. Ricardo's economic thinking took definite shape in critical systematization of Adam Smith's scattered exposition, and further study proceeded for a decade strictly within these lines.

The body of economic opinion which we may conceive therefore as attained by Ricardo in study of the "*Wealth of Nations*," and as asserted by him in argument and correspondence until the economic controversies of 1813-17 gave an effective impulse in another direction—was the system of Adam Smith, rid of its inconsistencies, made relentlessly logical, but in the main unchanged. This is very well illustrated by considering the development of Ricardo's concept of value.

An acute student of the Ricardian economics has said that "we are indebted to the Bullion controversy for the Ricardian theory of value."¹ But this can be true only in the most general sense. The subject had become fairly clear in Ricardo's mind long before 1809-10; and the effect of subsequent currency discussion—such as that growing out of Bosanquet's assertion that years of scarcity and high taxation, and not excessive circulation, were responsible for the rise in prices—was, at most, clearer definition and further application of a theory of value and price then already well in mind, rather than independent formulation of a new theory.²

Ricardo's concept of value, in its first or Smithian phase, was on the verge of change in 1815. Moreover, in the "*Essay on the Influence of a Low Price on Corn on the Profits of Stock*," published in that year, the theory of value

¹ Cannan, *History of Theories of Production and Distribution*, p. 388.

² See Reply to Bosanquet (1811), chap. viii, in *Works*, pp. 354-359; also Bosanquet, *Practical Observations on the Report of the Bullion Committee* (second edition, corrected, 1810), p. 92 et seq.

figured far less as a novel or basic doctrine, requiring explicit assertion or detailed exposition, than as a restatement of a familiar principle cited merely to establish the proposition that with the progress of wealth the landlord might be expected to benefit not only "by obtaining an increased quantity of the produce of the land, but also by the increased exchangeable value of that quantity."¹ But even from this more or less indirect and partial exposition it is not difficult to reconstruct the theory of value which we may conceive as attained by Ricardo in critical study of the "Wealth of Nations," and as asserted by him thereafter in argument and correspondence until the economic controversies of 1813-17 gave an effective impulse in another direction.²

Starting from Adam Smith's recognition—in itself at least as old as Aristotle—of the two different meanings attaching to the word "value" (namely, value in use and value in exchange), Ricardo pursued the course then already made familiar by successive expositors. Value in use is utility. Utility, associated with scarcity and necessary expenditure of labor, confers value in exchange, with which alone economic analysis is concerned. Of the three attributes of exchange value, utility, although always an "absolutely essential"³ condition, is insufficient as the basis of exchange relations. On the other hand, the second attribute, scarcity—relative to "the varying wealth and inclinations"⁴ of prospective purchasers—is the sole determinant of the value of the limited number of commodities whose quantity cannot be increased by labor.

¹ Essay on the Influence of a Low Price of Corn, in Works, p. 377.

² The nearest approach to an exposition of this first phase of Ricardo's treatment of value to be found in his own writings is represented by pages 1-15 of chapter i "on value" in the first edition (1817) of the Principles. The chapter as published was undoubtedly composed at different times and under the dominance of different ideas, and it is not entirely fanciful to regard either the formal break (omitted after the first edition) on page 12, or the end of the second paragraph on page 15, as the line of stratification.

³ Principles (1817), p. 2.

⁴ Ibid., p. 3.

It is not, however, with this bare handful of scarcity goods, but with the great mass of freely produced, competitively exchanged commodities, such as can be increased in quantity by the exertion of human industry, and on the production of which competition operates without restraint, that Ricardo's, like Smith's, further discussion "of commodities, of their exchangeable value, and of the laws which regulate their relative prices," is associated.¹

At the basis of exchangeable or relative value lies the concept of positive or absolute value. Possessing utility and scarcity, commodities are valuable in themselves, in proportion to the capital employed and the labor expended in their production.² Positive value is thus the same as cost of production, consisting of wages of labor and profits of stock.³ But the subject of inquiry is not the value of a commodity in itself, but in its relation to other commodities. Positive values must thus be compared and measured. The positive value of a commodity reduced to commensurable form for the determination of relative equivalences constitutes its exchangeable or relative value.⁴

Up to this point there is little, if anything, to distinguish Ricardo's thought from Adam Smith's exposition. In stating it, Ricardo would probably have slipped more easily than Smith into the loose habit of speaking of labor expenditure as a cause—indeed, the sole cause—of exchangeable value—"the original source of exchangeable value."⁵ But this was as far from Ricardo's real meaning as it was from Smith's. On the other hand, Ricardo was even less concerned than Smith with the value of a commodity in itself—that is, with

¹ *Principles* (1817), p. 3.

² Letters of Ricardo to Trower, p. 151; cf. *ibid.*, p. 162.

³ *Principles* (1821), p. 46, note; cf. *ibid.*, p. 107; also *Essay on Influence of Low Price of Corn*, in *Works*, p. 377, note; and finally, *Malthus, Measure of Value* (1823), p. 4.

⁴ Cf. the question discussed at the meeting of the Political Economy Club on January 5, 1824, with Torrens in the chair and with Malthus, Tooke, Mushet, James Mill, Senior, Warburton and Grote among those in attendance; "In what does the circumstance which determines Exchangeable Value differ from the measure of it?" see *Minutes of Proceedings, 1821-82*, vol. iv, p. 60.

Principles (1817), p. 5.

its intrinsic significance to its possessor—but, exclusively, with the several amounts of other commodities which it might secure in exchange. His interest thus lay not with positive, but with relative value, and consequently less with the cause than with the measure of exchange value.

Adam Smith had asserted that in “that early and rude state of society which precedes both the accumulation of stock and the appropriation of land”¹ commodities exchange in proportion to the quantities of labor expended in acquiring them. But even in the economic world which Adam Smith saw about him such a measure of exchange value was clearly unworkable. Few, if any, commodities were the product of labor alone. Land, labor, and capital co-operated in production, and the great mass of goods embodied the association in various proportions of these three factors. Such composites could clearly not be estimated in terms of a single unit. A product embodying *a* land and *b* labor and *c* capital, was incommensurable, in the manner proposed, with respect to a commodity to which *c* land and *a* labor and *b* capital contributed.

Adam Smith met, or failed to meet, this difficulty by unconsciously or tacitly substituting—in Professor Wieser’s phrases²—an “empirical” for the earlier “philosophical” measure of value. He asserted that in ordinary industrial intercourse—that is, as soon as capital had been accumulated and a rent paid for land—relative exchange values were determined by the respective amounts of labor which the several commodities would command instead of by the several amounts necessary for their respective production. Such a substitution involved, up to a certain point, no logical fallacy, and was possible at no greater cost than the sacrifice of doctrinal continuity. In so far as goods are the product of labor alone and that labor remains constant,³ the circumstance that commodity *A* exchanges, over any considerable

¹ *Wealth of Nations*, Book I, chap. vi (ed. Cannan, vol. i, p. 49).

² Wieser, *Natural Value* (1893), xxvii–xxviii.

³ An assumption which Ricardo was unwilling to concede; cf. *Principles* (1817), p. 6.

period, for commodity B, makes it possible to assert that the value of each is measured either (1) by the amount of labor involved in its production or (2) by the amount of labor which possession of the commodity will command. Under such conditions the producer may be expected to receive for his product an amount of labor equivalent to that embodied therein, and either unit of measurement is applicable.

But the identity is no longer visible when production has become capitalistic, and interest and, with Adam Smith, rent enter into cost of production, co-ordinate with wages. The first mode of measurement is now distinctly inadequate. Dependent upon it alone, the values of bread produced by labor alone, of shoes produced by labor associated with capital, and of cloth to which labor, capital, and land have contributed, are incommensurable. On the other hand, the second unit of measurement is workable. Such commodities can be compared with regard to the respective amounts of labor which they will command, even though their several costs of production cannot be reduced to terms of labor. Thus by a manner of empirical parallelism a "labour commanded" unit replaced a "labour embodied" unit, and became the characteristic feature of Adam Smith's theory of value.¹

The transition once effected, Smith undertook to find further and distinctive warrant for "commanded labour"² as "the only universal as well as the only accurate measure

¹ It is likely that an identical train of thought induced Malthus in his *Political Economy* (1820) to incline, although not completely to assent to "the quantity of labour which a commodity will command" as a measure of value rather than "the quantity it has cost," and even more in his *Measure of Value* (1823) to urge Adam Smith's "labour commanded" unit as a measure of value in preference to Ricardo's "labour embodied" unit, or even to his own earlier "mean between corn and labour." It is characteristic that this transition which Adam Smith merely suggests, Malthus describes with naive explicitness; cf. his *Political Economy*, p. 124, and his *Measure of Value*, pp. 15, 16. This subject is treated incidentally, but with much originality and acuteness by Professor Patten in his *Theory of Dynamic Economics* (1892), chap. vi.

² Represented, practically, by corn for long and by silver for short periods

of value, or the only standard by which we can compare the value of different commodities at all times and at all places.”¹ But this contention, although far more prominent in exposition, was distinctly subordinate in theoretical importance, and offered an easy target for critical attack.

The logical consistency of Ricardo's thought resented Adam Smith's empiricism. Short work was made of the claim that “commanded labour” formed an absolutely accurate standard of value. From none of the sources of fluctuations which disqualified—as Adam Smith himself had clearly shown—gold or silver from serving as an invariable standard were the proposed substitutes free.² But Ricardo's prime dissent was more fundamental. That a particular unit of measurement should be adequate for determining the exchangeable value of commodities in primitive industrial conditions, but must be abandoned after the accumulation of capital and the appropriation of land had shaped economic production, seemed to Ricardo's mind negligent and fallacious reasoning. The employment of capital and land as production goods might qualify the original simplicity and universality of the labor measure, and even compel the recognition of particular categories as exceptional. But this was very different from throwing over the entire theory, and comparable rather to that slight modification of the labor theory—recognized by Adam Smith and confirmed by Ricardo—whereby differences in the quality of labor were adjusted by the higgling and bargaining of the market according to “that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life.”³

Probably even at this period Ricardo would have admitted that we have no knowledge of any one commodity “which now and at all times required precisely the same quantity of labour to produce it,” and that a perfect standard of value was therefore unobtainable. Yet he would doubtless have

¹ *Wealth of Nations*, Book I, chap. v (ed. Cannan, vol. i, p. 38).

² *Principles* (1817), pp. 7–11.

³ *Wealth of Nations*, Book I, chap. x (ed. Cannan, vol. i, p. 33).

added then, as he did a few years later, that, if we undertake to ascertain what are "the essential qualities of a standard," and to study "the causes of the variation in the relative value of commodities" and "the degree in which they are likely to operate," we shall find that "under many circumstances" . . . "the quantity of labour bestowed on a commodity" is "an invariable standard, indicating correctly the variations of other things."¹

At this point Ricardo paused. Not yet prodded by James Mill to written exposition nor even impelled by current debate to consecutive statement, he remained mentally content with the general outline of Adam Smith's concept of value. But this acquiescence was emphatically subject to the reservation, conceived with much of the precision and maintained with all of the vigor that distinguished Ricardo's doctrinal thought, that Adam Smith had erred in abandoning his original measure of value—namely, "embodied labour"—and that the same principles determined exchange relations in advanced industrial conditions that prevailed in "that early and rude state of society" which preceded the use of capital and the appropriation of land.

There is trace here and there of other appreciable amendments of Adam Smith's doctrines, to be associated with this first phase of Ricardo's economic thinking. Thus Ricardo was inclined to doubt that "the equality of profits will be brought about by the general rise of profits"; but rather that "the profits of the favored trade will speedily subside to the general level."² He by no means agreed with Adam Smith respecting the effects of taxation on the necessities of life.³ He added to Adam Smith's account of the defects of taxes on the transference of property the further objection that they "prevent the national capital from being distributed in the way most beneficial to the community."⁴ He dissented

¹ *Principles* (1817), pp. 6, 7, 11, 12.

² *Ibid.*, p. 148.

³ *An Essay on the Influence of a Low Price of Corn on the Profits of Stock*, p. 38 n.; also *ibid.*, p. 44.

⁴ *Principles*, p. 192.

from Adam Smith's implication that the export of manufactures was necessary to give employment to the capital which produced them by insisting that "there can never, for any length of time, be a surplus of any commodity."¹ He declared that "Little dependence for information can be placed on that which is the fixed and legal rate of interest," in answer to Smith's doctrine that "the market rate of interest will lead us to form some notion of the rate of profits, and the history of the progress of interest afford us that of the progress of profits."² He doubted "whether a mother country may not sometimes be benefited by the restraints to which she subjects her colonial possessions," whereas Adam Smith believed that such a course "is not less injurious to the mother countries themselves, than to the colonies whose interests are sacrificed,"³ and he was of the opinion that "Adam Smith constantly magnifies the advantages which a country derives from a large gross, rather than a large net income."⁴

It is possible that even these differences, or at least some of them, came later and dated from that critical re-reading and annotating of the "Wealth of Nations" which immediately preceded the actual composition of the "Principles of Political Economy and Taxation."⁵ But admitting earlier origin, the aggregate effect was inconsiderable—leaving Ricardo on the eve of the corn-law debate, like James Mill, Malthus, Francis Horner and most of those to whom the term "political economist" was just then beginning to be applied—essentially an expositor of Adam Smith.

The second and major phase of Ricardo's activity as a theoretical economist is directly traceable to the corn-law controversies of 1813-17 and to active debate with Mill, Malthus, McCulloch, Say and Torrens as to controverted

¹ *Principles* (1817), p. 402.

² *Ibid.*, pp. 410-411.

³ *Ibid.*, pp. 476-477.

⁴ *Ibid.*, p. 491.

⁵ See below, p. 80.

economic doctrines. It was inevitable that Ricardo's thought during this period should take the form of a theory of distribution and that it should centre about the rate of profits. As to the first of these—the importance of a theory of distribution in a system of social economy—Ricardo's heritage from Adam Smith was inconsiderable. Mr. Cannan's studies have made clear that the theory of distribution contained in the "Wealth of Nations" is in reality "no essential part of the work," and that it is little more than his observations on rent, wages and profits given an unreal formalism in consequence of "the acquaintance with the French *Économistes* which Adam Smith made during his visit to France with the Duke of Buccleugh in 1764-6."¹

But in the generation which intervened between Adam Smith and Ricardo, and more particularly in the decade and a half from the Bank restriction to the corn law controversy, the problem of economic distribution was thrust much to the fore. To some extent—perhaps more than has been admitted—this was the work of theoretical economists, notably of Turgot and of J. B. Say. But to a far greater degree, and with determining influence in the case of Ricardo, it resulted from the economic events of the period. From 1800 to 1815, the years of Ricardo's hibernation as a theoretical economist, the three great struggles—currency, corn-laws and public finance—which have already been referred to as constituting the conspicuous elements in the Ricardian background were acute political issues, challenging the attention not merely of economic students but of all intelligent men of affairs.

In each case, the question at stake was whether legislation should have regard for the condition of one particular class rather than of another—fairly compelling antecedent consideration of the theoretical principles governing existing incomes. Thus the controversy growing out of the Bank restriction turned on the point as to whether the debtor class

¹ Editor's Introduction to *Wealth of Nations*, xxx.

of the community should be favored by expanding issues of inconvertible notes and by a depreciating monetary standard, or whether the creditor class should be protected or even benefited by compelling the Bank to resume specie payments and in anticipation thereof to contract its circulation. The corn law debates, in parliament and out, could be summed up in a simple alternative: should the commercial policy of Great Britain be shaped in the interest of the agricultural classes by checking the importation of foreign grain, or in the interest of the manufacturing classes, both capitalist-employer and wage earner, by securing a cheaper food-supply. With respect to national finances, the issue was, larger resort to taxation, with minor disputes in the matter of incidence, or continued use of funding with heavy drain upon posterity.

It was no less natural, having in mind ultimate consequences and the largest social good, that Ricardo should regard the rate of profits as the paramount consideration in shaping the nation's economic policies—not as a thing in itself but as the symptom of favorable conditions and tendencies.

The principle that a high rate of profits was a cause and an index of increasing national wealth was one of the most influential doctrinal contributions made by Adam Smith to economic thought. The neo-mercantilist exaltation of a low rate of interest had become discredited by the rising industrialism, and the changed creed found favor and justification in the obvious connection between the huge industrial profits and the greater national strength of the new era.

The burden of Adam Smith's economic philosophy in this particular was, that the utility of an economic institution is determined by its influence upon social progress. But social progress is conditional, other things being equal, upon an augmentation of capital. The economic state of society will be progressive, stationary or declining, according to the rapidity with which the national capital increases. This accumulation, assuming no marked change in the habits of

the capital owning class, depends in turn upon the rate of profits. Increasing profits, if derived from more efficient production and not from the exploitation of labor, means larger savings from income, increased employing funds, more active demand for labor, greater production of necessities and conveniences and added social well being.

To this philosophy, succeeding economic opinion lent itself, and to it up to the eve of the corn law struggles, Ricardo, like Mill and Malthus, in general terms adhered. But the acute agricultural unrest in England in 1813 and the parliamentary discussions that accompanied it could not fail to attract Ricardo's attention and to disturb his economic opinions. In the early part of 1814 doctrinal discussion with Malthus passed from the "old question" of the influence of the currency upon the foreign exchanges to the more immediate problem of the prospective effect of the proposed corn duties upon economic classes and upon their respective incomes.¹

Either because it was "the simple belief, common enough among the commercial class of his time,"² or, more probably, because it was in essence a legitimate heritage from Adam Smith, Ricardo inclined to the belief that restrictions on imports mean a higher price of corn, that the increased price of food causes a rise in wages, that higher wages are attended by lower profits and interest, and that "it is the profits of the farmer which regulate the profits of all other trades."³

The controversy began with Malthus's denial that the last proposition, that agricultural profits determine general profits, was any more true than its converse, and consequently that a cheaper method of obtaining food was not the only means of raising profits. Thus a new foreign market, giving a greater demand and higher prices for domestic wares would mean higher gain in particular trades, higher

¹ Letters of Ricardo to Malthus, p. 25.

² Cannan, *History of Theories of Production and Distribution*, p. 164.

³ Letters of Ricardo to Trower, pp. 5-6.

interest in general, and ultimately higher profits in agriculture.¹

Gradually the point at issue took more definite shape. In August, 1814, it was the "effect which must *necessarily* follow from restrictions on the importation of foreign corn."² A few months later Ricardo declared facility of obtaining food to be "almost the sole cause," while Malthus admitted that it "may be safely said to be the main cause" of high profits.³ Thereafter, the difference resolved itself into Ricardo's contention that restrictions on the importation of corn were the invariable, permanent cause of low profits, and Malthus's denial that this consequence was either necessary or peculiar.

With the greater precision of thought brought by this controversy, and even more by Malthus's explanation of the nature and cause of rent⁴—abundantly confirmed as it

¹ Letters of Ricardo to Trower, p. 5.

² Letters of Ricardo to Malthus, p. 38.

³ *Ibid.*, p. 46.

⁴ It is possible that Ricardo's indebtedness to Malthus and West in the matter of the differential theory of rent is less than has commonly been supposed and less indeed than Ricardo's own expressions in the Preface to the "Principles" have been taken to mean (cf. a paper by the present writer on "The Concept of Marginal Rent" in *Quarterly Journal of Economics*, January, 1895). In the Introduction to the "Essay on the Influence of a Low Price of Corn" Ricardo explained that the principles which regulate rent as therein set forth "differ in a very slight degree" from those developed in Malthus's tract to which he was "very much indebted." To the close student of Ricardo's literary manner this language, as indeed the more explicit phrases of the Preface to the "Principles," suggest an acknowledgment of prior publication rather than of doctrinal obligation. Something akin to this, at least was McCulloch's opinion: "It is well known to many of his [Ricardo's] friends," McCulloch wrote in 1828, "that he was in possession of the principle [of rent], and was accustomed to communicate it in conversation, several years prior to the publication of the earliest of these [Malthus's and West's tracts] works" (Note on Rent in McCulloch's edition of *Wealth of Nations*, 1827, vol. iv, p. 125). On the other hand, McCulloch's memory was not always trustworthy—in this very connection Ricardo's tract is described (*ibid.*, p. 124) as "two years after," that is, of 1817. Moreover, if the point is to turn upon the date of inception of the doctrine of rent as well as of its publication, account must certainly be taken of the fact that Malthus's "Inquiry into the Nature and Progress of Rent" contains "the substance of some notes on Rent, which, with others on different subjects relating to political economy, I have collected

was by the testimony of practical agriculturists before the parliamentary committees—Ricardo not only grew convinced of the fallacy in Malthus's protectionist position, but, more fundamentally, he became aware of the basic defects in Adam Smith's doctrines as to the inter-relations of wages, profits and rents. Ricardo wrote the "Essay on the Influence of a Low Price of Corn on the Profits of Stock" primarily to make clear that Malthus's protectionist conclusion was at variance with his free trade reasoning. But the larger significance of the "Essay" is that it marks the passing of Ricardo from an expositor of Adam Smith to the author of an independent system of economic relations. Impelled to doctrinal controversy and imbued with traditional conviction as to the importance of an increasing supply of national capital, Ricardo sought a theoretical basis for his controverted opinions upon pending issues by establishing the principles which determine the several parts of the national income.

It would not be easy to find in the history of modern science an example of a radical doctrinal change proposed in so unpretending a form. The "Essay" is a brief pamphlet of less than fifty pages. Of this the latter half is given over to answering Malthus's specific protectionist arguments. In some twenty-five loosely printed pages the theoretical exposition is set forth, if indeed that term can be applied to a series of memoranda-like paragraphs.

Ricardo's doctrine is briefly this: The rate of profits of commercial and industrial capitals is determined by the profits of agricultural capital. But capital applied to agri-

in the course of my professional duties at the East India College"—which began in 1807 ("Inquiry," Advertisement); and that "the chief object" of West's "Essay on the Application of Capital to Land" was "the publication of a principle in political economy, which occurred to me some years ago" (Essay, p. 1).

Whatever conclusion be reached as to the respective claims of Ricardo, Malthus and West, I am unable in the light of the foregoing evidence to concur with the suggestion of Professor Seligman that "in the interests of historical accuracy" priority either as to inception or publication of the theory of rent is to be ascribed to Rooke and to Torrens ("On Some Neglected British Economists" in *Economic Journal*, September and December, 1903).

culture would if left to itself in consequence of the varying fertility and proximity of land, yield different returns. By the operation of ordinary competition, the least profitable employment will determine the general rate; that is to say "the general profits of stock depend wholly on the profits of the last portion of capital employed on the lands." Rent, on the other hand, is that portion of the value of the whole product which is left after the deduction of profits as so determined and of "all the outgoings belonging to the cultivation of land," that is, wages. Obviously then rent and profits have "a very intimate connexion with each other." As society increases in wealth and population, that is, as there is more capital seeking employment and more mouths to be fed, profits must fall and rents rise. This fall of profits will be checked, or in converse case, accelerated either by improvements in agriculture whereby the gross product is increased at the same cost, or by a fall in wages consequent upon population increasing at a more rapid rate than capital. But assuming that "no improvements take place in agriculture, and that capital and population advance in the proper proportions, so that the real wages of labour continue uniformly the same"—then with the growth of capital and the increase of population, cultivation will be extended to the more remote and less fertile land and to less productive uses of soil already under cultivation, with the consequence that rents will rise and "precisely in the same degree" profits fall first of agricultural capital, and thereafter, in direct relation, of capital employed in manufactures and commerce.

The "Essay" appeared in February–March, 1815. To his fellow economists—Mill, Malthus, West and Torrens—the performance was marred by the prominence of its practical conclusion, giving it the apparent significance of a mere tract of the time. To the public at large, even to the serious-minded part of it, the theoretical exposition was obscured by the disjointed elliptical quality of the argument—it was written in hardly more than a week. Ricardo was

soon made aware of these defects and of the desirability of a fuller statement. In August, 1815, he wrote from Gatcombe Park to J. B. Say in France: 'I learn from Mr. Mill that several persons in this country do not understand me because I have not explained my views at sufficient length; and he is trying to induce me to undertake an explanation of them from the beginning, and at greater length; but I fear that the undertaking is beyond my powers.'¹

That Ricardo was nevertheless contemplating such a project seems to have been well understood by his friends. Say wrote to him in December, 1815, that he would wait, in the matter of further controversy, for Ricardo's full explanations in the larger work, and added longingly 'How I envy your lot, to study political economy in your beautiful retreat of Gatcomb Park!'² The contest with the Bank intervened, and the "Proposals for an Economical and Secure Currency" was Ricardo's next publication. Not until the spring of 1816 did abstract speculation again seriously engage his attention. In April of that year, he wrote to Malthus: "I hope you have made better use of your time than I have done of mine, and that you are making rapid advances with the different works which you have in hand. I have done nothing since I saw you as I have been obliged to go very often into the city, and after leaving off for a day or two I have the greatest disinclination to commence work again. I may continue to amuse myself with my speculations, but I do not think I shall ever proceed further. Obstacles almost invincible oppose themselves to my progress, and I find the greatest difficulty to avoid confusion in the most simple of my statements."³

Business affairs in London continued sadly to interrupt the progress of his studies. "My labours have wholly ceased for two months;" he wrote to Malthus in May, 1816, "whether in the quiet and calm of the country I shall again resume is very doubtful. My vanity has not received suffi-

¹ Letters of Ricardo to Malthus, p. 92.

² *Ibid.*, p. 93.

³ *Ibid.*, p. 115.

cient stimulus to remove the temptation which is constantly offering itself to the indulgence of my idle habits."¹

But Ricardo's temper, despite his disclaimer, was hardly of a kind lightly to abandon a plan once conceived, and we are not surprised to find him noting in October, 1816: "I shall continue to work, if only for my own satisfaction, till I have given my theory a consistent form."² Once back at Gatcomb the work of composition proceeded rapidly. In January, 1817, he wrote in detail to Malthus of its progress: "I have been occasionally employed, since we met, in putting my thoughts on paper, on the subjects which have often passed under our discussion. I have encountered the usual obstacles from difficulties of composition; but I have resolutely persevered till I have committed everything to paper that was floating in my mind. There are a few points on which there is a shadow of difference between my present and my past opinions; but they are not those on which we could not agree. I hope I shall succeed in putting my MS. in some tolerable order, as on that will depend whether I shall again appear before the public. What I have hitherto done is rather a statement of my own opinions than an attempt at the refutation of the opinions of others. Lately, however, I have been looking over Adam Smith, Say, and Buchanan, and where I have seen passages in their works contrary to the principles I hold to be correct I have noticed them, and shall perhaps make them the subject of some comment."³ By the end of February, 1817, the manuscript was virtually complete and the actual printing had begun. A month later the last sheets were sent to the printer, and in April, 1817, the "Principles of Political Economy and Taxation" was in the hands of the public.⁴

The volume was in scope and in bulk an impressive con-

¹ Letters of Ricardo to Malthus, p. 117.

² *Ibid.*, p. 120.

³ *Ibid.*, p. 125.

⁴ [April 2, 1817] "I accompanied Ricardo on Saturday to Holland House. He seemed pleased with his visit. His book is coming out immediately" (Whishaw to Smith in *The Pope of Holland House*, p. 180).

trast to everything that Ricardo had before written. Instead of a brief pamphlet upon a pending politico-economic issue, we have a bulky octavo of nearly six hundred pages undertaking in some thirty-one chapters to discuss the most important economic and fiscal categories.

The "Preface" gives promise of deliberate plan and orderly arrangement. To determine "the laws" which regulate in different stages of society the proportions of the produce of the earth allotted as rent, wages and profit—is set forth as "the principal problem in Political Economy." Previous writers had afforded "very little satisfactory information" as to these, and unacquaintance with "the true doctrine of rent," lately enumerated by Malthus and West, had led to the neglect of "many important truths." Modestly, with full acknowledgment of aid from earlier economic writers and from the practical events of recent years—Ricardo proposed to state his opinions upon the effect of the progress of wealth on profits and wages, and upon "the influence of taxation on different classes of the community," not hesitating to combat received opinions when "the interests of science" seemed so to require.

The arrangement of the book falls far short of the systematic exposition promised by the "Preface." One of the most brilliant and original critics of the Ricardian economics has indeed urged, with very considerable plausibility, that not only was the "Preface" written after the completion of the "Principles" but that the first three paragraphs—the essential part—were drafted by James Mill.¹ In any event Mill's influence upon its composition must have been considerable—certainly not less than in the case of the "Proposals for an Economical and Secure Currency" which owes its introduction and its division into sections to Mill's critical counsels.

Of the thirty-one chapters, first place is given to value;

¹ Patten, "The Interpretation of Ricardo," in *Quarterly Journal of Economics*, April, 1893. This notable critique is repeated with certain striking amplifications and, unfortunately, certain bizarre additions in Professor Patten's *Development of English Thought* (1899), pp. 303-311.

in the next five come fairly consecutive outlines of rent, wages and profits. A chapter 'on foreign trade' is interposed, after which follow twelve chapters on taxation. The last twelve chapters are in the nature of additions, amendments and digressions with respect to what had preceded—owing their presence to suggestion, after-thought or critical memoranda, rather than to any deliberately conceived plan. Curious evidence of the carelessness or haste with which the book was made is the fact that the thirty-one chapters are numbered as twenty-nine, two being designated by asterisks.

It has been a favorite indulgence with those who have given diligent study to the "Principles"—Gonner, Patten, Diehl, Denis—to rearrange its chapters in an assumedly logical order. The best comment upon the futility of such endeavors is that no two attempts show approximate agreement. A safer and on the whole a more fruitful course is to take the book for what it is,—the reflex of an active intelligence rather than a schematized treatise, to trace the quick but certain mental development and to interpret the record in the light of this personal history.

If we turn from the form to the content of the "Principles," the first conspicuous fact which arrests attention is the new prominence and changed character given to the theory of value. The explanation lies in the fact that the initial chapter 'on value' of the "Principles" was designed less as an independent exposition of the concept than as a theoretical warrant for certain practical propositions theretofore advanced or defended by Ricardo. Thus (*a*) Ricardo believed, in opposition to Malthus, that lower profits could only result, in the long run, from higher wages; (*b*) he asserted that McCulloch's proposal to scale down the interest on the national debt was neither just nor equitable; and (*c*) he refused all credence to the popular fear that the free importation of corn would be followed by a further disastrous fall in general prices.

It was to give re-enforcement to such definite proposi-

tions that Ricardo developed and extended his original concept of value. The prime features of his modified exposition were, first, disagreement with the doctrine that every rise in wages must necessarily be transferred to the price of commodities, and, second, demonstration of the converse dictum, that higher wages were actually compatible with lower prices. The extent to which this doctrinal development was an incident of the practical controversies noted above will appear more clearly if the precise points at issue be considered in some greater detail.

The discussion with Malthus which resulted in the "Essay on the Influence of a Low Price of Corn" also left Ricardo aware of a vulnerable point in his theory of the inverse relation between wages and profits. It was impossible to prove that a rise in wages was the exclusive cause of a fall in profits, if it were true that a rise in wages necessarily occasioned a rise in prices. Were the latter the case, the manufacturer simply recouped himself from out of the higher price of his product for the higher wages he was obliged to pay, and profits remained unchanged. Thus the validity of Ricardo's theory of profits became, in a large measure, dependent upon his ability to prove that prices did not necessarily increase as wages rose.

The occasion of Ricardo's acquaintance with McCulloch was assertion and defence of the proposition that a rise in the price of corn did not involve a rise in general prices. In 1816 McCulloch sent to Ricardo, with whom he had had no prior intercourse his proposal, published first in pamphlet and later in book form, of a forcible reduction of the interest on the national debt conformable to the reduced value of corn.¹ Ricardo in reply expressed disagreement with the necessity of adopting so violent a remedy. He pointed out that McCulloch's plan was based upon the assumption that neither gold nor silver but wheat was the standard by which bank notes should be regulated, and that if adopted, the dividend on the national debt must be read-

¹ Letters of Ricardo to McCulloch, pp. 1, 2, 3-9.

justed to the price of wheat every year or every ten years. Then, pressing his analysis, Ricardo summed up: "Your system proceeds upon the supposition that the price of corn regulates the price of all other things, and that when corn rises or falls, commodities also rise or fall,—but this I hold to be an erroneous system, although you have great authorities in your favor, no less than Adam Smith, Mr. Malthus, and M. Say."¹ In how far Ricardo had at this later time of writing already reached the conclusion that a rise in the price of corn and in the rate of wages was not necessarily accompanied by a rise in general prices cannot be determined. It seems, however, reasonably clear that the discussion with McCulloch, centering as it did about a point on which Ricardo's views were most pronounced, should again have convinced him of the importance of completely refuting the fundamental assumption upon which McCulloch's proposal rested,—that general prices were regulated by the price of corn or the rate of wages.

A final impulse to disprove the proposition that lower wages were the cause of a fall in prices came to Ricardo from the general apprehension felt throughout the country that the removal of restrictions on the importation of grain would be followed by a disastrous fall in general prices. In the "Grounds of an Opinion on the Policy of Restricting the Importation of Foreign Corn" (1815) Malthus had called attention to the "considerable check to industry" which the fall in general prices incident to the return to specie payments must occasion, and then cautioned, "it certainly does not seem a well-chosen time for the legislature to occasion another fall still greater, by departing at once from a system of restrictions." Similarly, in another passage, Malthus pointed out how the great majority of "the class of persons living on the profits of stock" will in such event "feel very widely and severely the diminution of their nominal capital by the fall of prices." So wide-spread was this impression and so animated the discussion that it

¹ *Ibid.*, p. 6.

excited that, writing in 1824, McCulloch could say, "the discussions respecting the policy of restrictions on the corn trade, and the causes of the heavy fall of prices which took place subsequently to the late peace, by inciting some of the ablest men that this country has ever produced to investigate the laws regulating the price of raw produce, the rent of land, and the rate of profit, have elicited many most important and universally applicable principles."¹ On the one hand believing firmly, as he did, in the desirability of free trade in corn, and on the other hand recognizing the serious effect of falling prices, it was inevitable that Ricardo should have undertaken to prove that there was no necessary connection between the two phenomena. Thus impelled from three distinct quarters, it is not surprising that an urgent concern of Ricardo from the publication of the "Essay on the Influence of a low Price of Corn" in 1815 to the appearance of the "Principles" in 1817 should have been disproof of the dictum that high wages necessarily meant high prices.

But no principle in the then existing body of economic thought was more firmly intrenched than this "received doctrine"² which Ricardo proposed to assail; while the theory which he urged in substitution could at best be described as possessing "the disadvantage of novelty" and opposed by "writers of distinguished and deserved reputation."³ The whole trend of Adam Smith's reasoning had been to prove that a rise in the price of corn is immediately followed by a proportionate rise in the price of labor and of all other commodities.⁴ Malthus had early declared that "the money price of corn, in a particular country, is undoubtedly by far the most powerful ingredient in regulating the price of labour, and of all other commodities," even

¹ A Discourse on the Rise, Progress, Peculiar Objects, and Importance of Political Economy (1824), pp. 64-65.

² Principles (1817), p. 39.

³ Ibid., p. 42; see also McCulloch in Edinburgh Review, June, 1818, p. 68.

⁴ Wealth of Nations, Book iv, chap. v; cf. Malthus, Observations on the Effects of the Corn Laws (3d edition, 1815), p. 11.

though "it is not the sole ingredient."¹ Say had asserted, "Si le prix du blé augmente, il [un chef d'entreprise, fermier, manufacturier ou négociant] est obligé d'augmenter, dans la même proportion, le prix de ses produits."² Torrens had shown in detail that "A rise in the price of corn raises the price of labour, and the rise in labour is communicated to all commodities, both those which it immediately produces, and those to which these are employed as the equivalents."³ McCulloch, as we have seen, was so firmly convinced that the price of corn regulates the price of all other things, and that, when corn rises or falls, commodities also rise or fall, that he based upon it his proposal to scale down the interest on the national debt, and had invited Ricardo's assent thereto. Even Ricardo himself had in 1814 written to Malthus that "the prices of all commodities must increase if the price of corn be increased,"⁴ and a little later had referred to "the increased value to which all goods would rise in consequence of the rise of the wages of labour."⁵

By the beginning of 1816 we may conceive Ricardo as fully realizing the importance of the particular point at issue, and as bringing to the task of doctrinal readjustment the best thought of which he was capable. With characteristic profundity he seems to have understood that the sure way to this result was by re-analysis of the theory of value, and to a re-examination of this theory he proceeded to devote himself.

In February, 1816, he wrote to Malthus: "I have not thought much on our old subject; my difficulty is in so presenting it to the minds of others as to make them fall into the same chain of thinking as myself. If I could overcome the obstacles in the way of giving a clear insight into the

¹ Essay on the Principle of Population (2d edition, 1803), p. 458; also Observations on the Effects of the Corn Laws, p. 11.

² Traité d'économie politique (1803), tome I, p. 294; cf. Ricardo, Principles (1819), p. 57, note.

³ An Essay on the External Corn Trade (1815), p. 88.

⁴ Letters of Ricardo to Malthus, p. 37.

⁵ Ibid., p. 39.

original law of relative or exchangeable value, I should have gained half the battle."¹ By October of the same year (1816) definite progress had been made: "I have been very much impeded by the question of price and value, my former ideas on those points not being correct. My present view may be equally faulty, for it leads to conclusions at variance with all my preconceived opinions. I shall continue to work, if only for my own satisfaction, till I have given my theory a consistent form."²

The "consistent form" was attained in the first edition of the "Principles," published in the spring of 1817. The keynote of the initial chapter 'on value' was, as has already been said, far less any explicit statement or detailed exposition of the general theory of value than—going even beyond what was required—demonstration of "the compatibility of a rise of wages, with a fall of prices."³

Ricardo's starting-point was the familiar postulate that, as long as the relative values of commodities were measured by "embodied labour," only an increase in the amount of labor necessary to produce them could augment their value, and only a decrease would lower it. A general rise or fall in wages caused no change in prices. If "embodied labour" could thus be established as a universal measure of value, Ricardo's purpose, to prove that prices did not necessarily rise or fall as wages rose or fell, was attained. But Adam Smith, "and with him"—added McCulloch—"every other political economist down to Mr. Ricardo,"⁴ had asserted that the circumstances which determined relative values "in a rude state of society"—namely, "embodied labour"—were altered when capital and land figured in economic production. Thereafter relative values were no longer measured solely by "embodied labour." Profits and rent entered as component parts into price, and the real prices of commodities were increased or diminished by

¹ Letters of Ricardo to Malthus, p. 111.

² Ibid., p. 120.

³ Principles (1817), p. 42.

⁴ Edinburgh Review, June, 1818, pp. 63-64.

every corresponding change in the ordinary rate of profits, the rate of wages and the rent of land.

We have seen that dissent from Adam Smith's abandonment of a "philosophical" for an "empirical" measure of value was a characteristic of the first phase of Ricardo's treatment of value. But this was, at best, the desire of a rigidly logical mind to rectify what appeared to be an illogical and unwarranted lapse. With the controversies of 1815-16 a much greater stake became the issue. It required no profound analysis to make it clear that, if the use of capital and land affected relative values in the manner Adam Smith and his successors had described, then Ricardo's several contentions were without theoretical warrant. Naturally enough, therefore, the formal purpose of the chapter 'on value' in the "*Principles*" became "to determine how far the effects which are avowedly produced on the exchangeable value of commodities, by the comparative quantity of labour bestowed on their production, are modified or altered by the accumulation of capital and the payment of rent."¹

Of the two circumstances, the effect of rent payment received but brief attention, and that only, it may be suspected, to provide some logical introduction for the following chapter 'on rent.' Whatever further significance it possessed lay in the opportunity it afforded Ricardo to broaden the principle of "embodied labour" as a measure of value, so as to refer to that portion of the supply produced under the most favorable circumstances.² This interval once bridged, he easily dismissed the matter.

The relation of profits to the law of value was Ricardo's real concern. Two commodities respectively produced by different amounts of labor conjoined with identical amounts of capital exchanged—like commodities produced by labor

¹ *Principles* (1817), p. 16.

² *Ibid.*, p. 67. In this particular Professor Gonner's interpretation (*Introductory Essay*, p. xxxiii, to his excellent edition of Ricardo's *Principles*) seems more accurate than Professor Patten's (*Quarterly Journal of Economics*, April, 1893).

alone—in proportion to “embodied labour.” Even if the capitals engaged were different in amount, but identical in durability and in apportionment between fixed and circulating capital, the two commodities would exchange in proportion to the total quantity of labor respectively necessary to manufacture them and bring them to market, including in the term “total quantity” both the labor necessary to the manufacture of the commodity itself and that necessary to the formation of the capital by the aid of which it was produced. No alteration in the wages of labor nor in the profits of capital could effect any alteration in the relative value of such commodities. Nor, since the money in which they were valued was by supposition of an invariable value, could there be any alteration in the prices of such commodities.

But the situation was otherwise, if the several commodities were produced with the aid of different proportions of fixed and circulating capital, or if the quotas of fixed capitals so employed were of different durability. In proportion, Ricardo explained, as circulating capital preponderated in a manufacture or in proportion to the less durability of its fixed capital and its approach to the nature of circulating capital, any increase in wages resulted in a rise in the value of such commodities relative to the value of other commodities produced with the aid of less circulating capital or more durable fixed capital. The relative values and, assuming an invariable money standard, the prices of all such commodities were inversely affected by every alteration in wages, and directly by every alteration in profits.

The phenomena introduced into exchange relations by the employment of capitals of unlike quality—responsible for the logical break in Adam Smith’s treatment of value, and glossed over, although not by any means neglected, in the first phase of Ricardo’s thought—were thus clearly recognized by Ricardo, in his second phase, as exceptions to the universal applicability and rigid accuracy of “embodied labour” as a measure of value.

That this qualification should have been explicitly developed and so cheerfully acquiesced in by Ricardo was due to the fact that it afforded, if anything, superabundant proof of the particular doctrine which he was seeking primarily to establish: the absence of direct variation between wages and values. In so far as "embodied labour" prevailed as a measure of value—money being supposed, as throughout, to be of an invariable value—a rise in wages obviously involved no increase in values or prices. But, in so far as the employment of capitals of different quality modified the applicability of "embodied labour" as a unit of value, a rise in wages resulted in an actual fall in values and prices. Ricardo was, above all things, fond of a paradox-like dictum;¹ and the close reader will detect almost a note of elation in the closing paragraph of his chapter "On Value": "It appears, too, that commodities may be lowered in value in consequence of a real rise of wages; but they never can be raised from that cause. On the other hand, they may rise from a fall of wages, as they then lose the peculiar advantage of production, which wages afforded them."²

A theory of distribution, of which the direct implication was that the importation of foreign corn meant higher profits and lower rent, would lead naturally enough to a discussion of the principles under which such importation does or does not take place. It is not surprising therefore to find in between 'the principles of political economy' as represented by the chapters on value, rent, wages and profits, and the following chapters on 'taxation'—the notable chapter 'on foreign trade.'

Effectively as Adam Smith had disposed of the mercantilist doctrine as to foreign trade, he had failed to substitute a definite theory. As Professor Bastable has pointed out, Smith's views on the real advantage of such trade are "somewhat doubtfully expressed, while his explanation of the division of gain between two trading countries is plainly

¹ See below, pp. 120-121.

² Principles (1817), p. 48.

erroneous." Those who followed, notably Foster and Torrens, make important contributions, but it was Ricardo's brilliant analysis that gave a scientific theory of international trade.¹

In the main a discussion of the principles of foreign exchange and of the considerations governing the international distribution of productive industry, Ricardo's chapter is dominated by the new doctrine that trade will take place between different countries only if, and whenever, there exists in such countries a difference in the comparative costs of producing the commodities traded in. As Cairnes has further explained the doctrine: "The commodity forming the staple of a trading country may be, and frequently is, more cheaply produced in that country than in the country which imports it, but this is not necessary to the existence of the trade; and a trade between nations may be carried on where the superiority in point of productive power with respect to all articles which form the subject of the trade is upon the side of one of them. On the other hand, a difference in the absolute cost of producing commodities in different countries does not necessarily render a trade between them possible, since, if the difference were the same in the case of each article, there would be no motive for an exchange. The one condition, therefore, at once essential to, and also sufficient for, the existence of international trade, is a difference in the comparative, as contradistinguished from the absolute, cost of producing the commodities exchanged."²

It was the exposition of this doctrine which McCulloch characterized as "one of the most valuable and original parts of the work" and "a striking example of Mr. Ricardo's uncommon sagacity in investigating and tracing the operation of fixed and general principles, and in disentangling and separating them from those of a secondary and accidental

¹ Bastable, *Theory of International Trade* (4th edition, 1903), p. 169.

² Cairnes, *Some Leading Principles of Political Economy* (1874), p. 310.

nature."¹ A decade later, John Stuart Mill began the first of his "Essays on some Unsettled Questions of Political Economy" with the declaration: "Of the truths with which political economy has been enriched by Mr. Ricardo, none has contributed more to give to that branch of knowledge the comparatively precise and scientific character which it at present bears, than the more accurate analysis which he performed of the nature of the advantage which nations derive from a mutual interchange of their production."²

Both doctrine and corollaries have long passed without question as distinctively Ricardian contributions. Recently however Professor Seligman has put forth the claim that as a matter of fact it was Colonel Torrens who "discovered the law of comparative cost, the credit of which is usually ascribed to Ricardo"³—and this dictum has been surprisingly enough incorporated in the "Appendix"⁴ (1908) to Palgrave's "Dictionary of Political Economy." The charge rests upon the presence in Torrens's "Essay on the Corn Trade" published in 1815 of the theory in outline, and upon Torrens's vigorous claim in the "Preface" to the third edition of the same work published a decade later (1826), of full title to discovery of this doctrine which, he asserts, Ricardo had thereafter and without acknowledgment "adopted" into his own treatise.⁵

It is worth while to examine this contention, both for its own intrinsic importance and even more because it very well illustrates the serious error into which many critics of Ricardo's doctrines have fallen by narrowly confining attention to the printed text and failing to interpret this text in the light of Ricardo's mental history as disclosed by his informal writing.

As a matter of fact, it is not unlikely that doctrinal in-

¹ *Edinburgh Review*, June, 1818, p. 83.

² *Essays on some Unsettled Questions of Political Economy* (1844), p. 1.

³ "On Some Neglected British Economists," in *Economic Journal*, September, 1903.

⁴ Sub "Torrens."

⁵ Preface, vii.

debtedness, if there was any, lay from the first from Torrens to Ricardo. The discussion of foreign trade contained in Torrens's earlier essay, "The Economists Refuted" published in 1808, suggestive as it is, contains no intimation of the law of comparative cost, but rests the entire case upon the principle of "territorial division of labor." We have no certain knowledge as to when Ricardo and Torrens first met, but in all probability this occurred soon after Ricardo's entry into the bullion controversy, and it is reasonable to suppose from the tenor of later correspondence that the two were in frequent association before the appearance of Torrens's "Corn Trade," in 1815. There is no direct reference to Ricardo in this first edition of Torrens's work—but the prefatory acknowledgment of aid "from private friendship" may possess some significance.

Certainly indebtedness to Ricardo was the case thereafter. "Have you seen Torrens' letter to Lord Liverpool," wrote Ricardo to Malthus on February 23, 1816, "He appears to me to have adopted all my views respecting profits and rent; and, in some conversation which I had with him a few days ago, he unequivocally avowed that he was now of my opinion, that the price of labour, arising from a difficulty in procuring food, did not affect the prices of commodities. He confessed that his former view on that subject was erroneous. I should be glad to see all the arguments in favour of my view of the question clearly and ably stated. I should not wonder if Torrens undertook it."¹

Even more striking than this is the passage in a letter of Ricardo to Malthus, dated May 28, 1816—almost a year before the appearance of Ricardo's "Principles": "Major Torrens tells me that he shall work hard for the next few months, so that we may expect a book on the same subject from him next year. He continues to hold some heretical opinions on money and exchange, notwithstanding Mr. Mill and I have exerted all our eloquence to bring him to the right faith. We, however, have succeeded in removing some

¹ Letters of Ricardo to Malthus, pp. 111-112.

of the obscurity which clouds his vision on the principles of exchange. He is, I think, quite a convert to *all* what you have called my peculiar opinion on profits, rent, etc., etc., so that I may fairly say that I hold no principles on Political Economy which have not the sanction either of your or his authority, which renders it much less important that I should persevere in the task which I commenced of giving my opinions to the public. Those principles will be much more ably supported either by you or by him than I could attempt to support them.”¹

The charge which Torrens made publicly in 1826, he had made privately to Ricardo some years before, indeed hard upon the publication of the “Principles.” The claim and Ricardo’s reply are set forth in a letter of Ricardo to Trower of August 23, 1817: “I presented Torrens with one of the first copies of my book; he was disappointed that I had not mentioned his name in it, and wrote to me to that effect, claiming some merit as the original discoverer of some of the principles which I endeavoured to establish. I had no design of neglecting his merits, and omitted to mention him because none of his doctrines appeared to me strikingly new and did not particularly come within the scope of the subject I was treating. There were some things in his book about which I pointedly differed from him, but refrained from noting them because I knew he was sensible, they were wrong, and had adopted and was going soon to publish more correct views to the public. In the correspondence which ensued between him and me, I endeavoured to shew, and according to Mill’s opinion I did shew, that on all those points which I had as I thought for the first time brought forward, his published opinions were in fact in opposition to mine, and on those which he said we agreed upon and for which he claimed the merit of originality, they were all to be found in Adam Smith or Malthus, and therefore neither of us could be called discoverers. Our altercation was carried on without the least acrimony, and ended by a com-

¹ Letters of Ricardo to Malthus, pp. 116–117.

plete restoration of cordiality, though accompanied with rather more reserve than before. He has dined with me twice since, and the last time he met Mr. Malthus for the first time and stoutly defended my doctrines, to which he is quite a convert, against Mr. Malthus' opposition to them."¹

It was doubtless as further balm to Torrens aggrieved sensibility, rather than as any appropriate acknowledgment of indebtedness, that Ricardo inserted in the second edition of the "*Principles*" published in 1819 two complimentary allusions to Torrens. The first of these consisted of an illustrative sentence cited from the "*Corn Trade*" as to the variation in "the natural price of labor," to which Ricardo added: "The whole of this subject is most ably illustrated by Major Torrens."² The second allusion was inserted at the end of the chapter "*On Sudden Changes in the Channels of Trade*:" "Among the most able of the publications, on the impolicy of restricting the importation of corn, may be classed Major Torrens *Essay on the External Corn Trade*. His arguments appear to me to be unanswered, and to be unanswerable."³ Had there been any specific indebtedness in the matter of the theory of international value, Ricardo—even though he had failed to refer thereto in the first edition—would in all reasonable certainty have made acknowledgement in the foot-note tributes which he inserted in the second.

Finally, it is not without significance that neither in his critical review of Ricardo's "*Principles*,"⁴ nor in the second edition of his own "*Corn Trade*" published in 1820, nor in his "*Production of Wealth*," issued in 1821, did Torrens—as he did with respect to other doctrines and as he very properly might have been expected to do with respect to this—set forth claim of priority and infringement. On the contrary in the "*Preface*" to the second edition (1820) of the "*Corn Trade*" he lauds in almost extravagant terms

¹ Letters of Ricardo to Trower, pp. 39-40.

² *Principles* (1819), p. 91, note.

³ *Ibid.*, p. 338.

⁴ Letters of Ricardo to McCulloch, pp. 15-16.

Ricardo's "very original work upon Political Economy and Taxation," apologizes for making no allusion in his treatment of profits to Ricardo's work and closes with the statement that "this general acknowledgment will be sufficient to convince the less curious reader, that in omitting to refer to Mr. Ricardo on each particular occasion in which his principles may have been embraced, it was not the intention of the Author to commit an act of plagiarism under the disguise of a different language and mode of illustration."

Only in 1826, three years after Ricardo's death, was the claim made by Torrens, and then only to be repudiated by those who knew both Ricardo and Torrens, and who can be considered as best cognizant of the doctrinal beginnings of the Ricardian economics—John R. McCulloch and John Stuart Mill.¹ Torrens was quick to charge plagiarism—to wit his intimations that Malthus had borrowed the principle of population from Wallace—whereas Ricardo was generous to a degree in acknowledging indebtedness, and it is difficult to believe in view of the definiteness of Ricardo's expressions and the lateness of Torrens's charge that there had been unrecorded "adoption" of Torrens's view.

Value, distribution and international exchange, although far from summing up the doctrinal content of the "Prin-

¹ In the *Westminster Review* in 1825 (January, p. 218), in the *Essays on Some Unsettled Questions of Political Economy* (p. 1) written in 1829-30 and in the *Principles of Political Economy* first published in 1848 (bk. iii, ch. xvii, § 2), John Stuart Mill ascribed authorship of the theory of foreign trade to Ricardo in almost extravagant appreciation. At some time, however, between 1857 and 1862, Mill seems to have become a convert to some part of Torrens's claim, then apparently set forth in different form and upon other warrant. In the sixth edition of Mill's *Principles* (1862) was inserted a foot-note to the effect, among other things, that "Colonel Torrens, by the republication of one of his early writings, *The Economists Refuted*, has established at least a joint claim with Mr. Ricardo to the origination of the doctrine and an exclusive one to its earliest publication." The "origination" here referred to can only have been the principle of the territorial division of labor, for it is only this, without the slightest intimation of the principle of comparative cost, that is contained in the *Economists Refuted* (1808); and even Torrens himself, in republishing the tract forty-nine years later, claimed priority for nothing more than this (*Preface*, xv, to 2nd edition, 1857, of *Principles of Sir Robert Peel's Act*).

ciples," certainly suggest its prime significance in the development of economic thought. Passing for the moment the twelve chapters given over to taxation—there remain twelve chapters which I have already characterized as critical additions, amendments and digressions rather than as organically related parts. Some of these stand in direct correlation with earlier chapters: as 'bounties on exportation, and prohibitions of importation' with the chapter 'on foreign trade,' and 'doctrine of Adam Smith concerning the rent of land,' and 'Mr. Malthus's opinions on rent,' with the chapter 'on rent.' Others like 'on bounties on production' and 'on currency and banks' present in succinct, didactic form the views which Ricardo had already put forth in train of practical controversies. Others still, like 'value and riches, their distinctive properties'—probably suggested by the first chapter of Say's "*Traité*," or 'on gross and net revenue,' clearly provoked by Adam Smith's physiocrat-like exaltation of agriculture—are the direct results of critical reading of texts, of spirited discussion with Mill, of friendly controversy with Malthus.

No single one of these can be passed over by the careful student of the Ricardian economics. Characteristically subtle in method and profound in treatment, the point of approach is often distinct and the disclosure illuminating, so that neglect of them as of Ricardo's pamphlets has too often made the remainder of the "*Principles*"—to borrow Mr. Cannan's phrase—"the happy hunting ground of the false interpreter." Yet all said and done, their value is supplementary rather than primary, serving to clarify and interpret Ricardo's theoretical contributions rather than to constitute such contributions in themselves.

The twelve chapters on taxation, constituting a full third of the bulk of the "*Principles*," likewise possess an interest and value, notable in themselves, but different from that attaching to the primary chapters on theory. In his "*Sketch of the Life and Writings of Dr. Smith*," Dugald Stewart observed—and to McCulloch the observation seems "per-

fectly just”¹—that Adam Smith’s treatment of the subject of taxation was “more loose and unsatisfactory than most of the others which have fallen under his review.”²

Ricardo probably shared this opinion to greater or less degree and some part of his early dissent from the “Wealth of Nations” had to do with the subject of taxation—the more, as with the progress of the Napoleonic contest the public burden became onerous. But here as throughout, the corn-law rent controversy and specifically, Malthus’s “Inquiry into the Nature and Progress of Rent” marked a distinct phase, and in the “Essay on the Influence of a Low Price of Corn on the Profits of Stock,” Ricardo characterized Malthus’s pamphlet as “a work abounding in original ideas,—which are useful not only as they regard rent, but as connected with the question of taxation; perhaps, the most difficult and intricate of all the subjects on which Political Economy treats.”³

The chapters on taxation of the “Principles” resolve themselves into a rigidly logical deduction, as to the incidence of the several forms of taxation, with respect to Ricardo’s theory of distribution. A tax on rent will be borne by the landlord. Taxes on produce, tithes and land taxes will fall on the consumer. A tax on profits will be ultimately borne by the producer. A tax on wages will always be shifted to profits. The simplicity of the premises, the rigor of the argument, the certainty of the conclusion have suggested the term the “absolute theory” as descriptive of Ricardo’s as indeed of Adam Smith’s doctrines of incidence.⁴ But in the light of its context, Ricardo’s analysis is “absolute” only in the sense in which any statement of a scientific tendency is enunciated in definite terms. Ricardo knew perfectly well that the complexity of practical affairs qualified and even counteracted the normal tendencies, and

¹ Edinburgh Review, June, 1818: “On Ricardo’s Principles of Political Economy and Taxation,” p. 83.

² Works, vol. x, p. 69.

³ In Works, p. 374, n.

⁴ Seligman, *The Shifting and Incidence of Taxation* (3d edit., 1910), pp. 147–151.

upon more than one accasion gave evidence of this. A few years later, possibly in consequence of his parliamentary experience, he not only shared Hutches Trower's "regret that the imporant subject of taxation receives so little attention from Political Economists," being "at this time—peculiarly important;" but he wrote to Malthus—in far from the spirit of one who deems the last word to have been spoken—"As soon as you have launched your present work, I hope you will immediately prepare to give us your thoughts on a subject in which we are all practically interested."¹ Two years after the "*Principles*" was published he freely admitted that "On the subject of taxation a wide field is open for those, who will patiently think, to give instruction to the Public"; but he insisted that "the first step must be to make the first principles of Political Economy known, and that yet remains to be done." As late as 1821 he was still conscious of the gap: "I, as well as you," he wrote to Trower, "would like to see an application of the *Principles* of Political Economy, as now understood, to the practical operation of taxation, and I hope it will not be long before such a work appears,"—adding in characteristic self-depreciation, "You make a great mistake in supposing me capable of producing so important a work."²

The third phase in the development of Ricardo's economic system, extending from the appearance of the "*Principles*" in 1817 to his sudden death in 1823, consists of certain minor but significant additions and amendments directly traceable to doctrinal controversies with friends and correspondents,—Malthus, Mill, McCulloch, Torrens, Trower and Say. Of these modifications the most important has to do with the theory of value, and the most radical with the influence of machinery.

At the outset Ricardo undoubtedly shared the optimism of Adam Smith and the economic liberals that despite the inconveniences and losses of temporary displacement the

¹ Letters of Ricardo to Malthus, pp. 164-165.

² Letters of Ricardo to Trower, pp. 83, 163.

introduction of machinery into industry redounded to the advantage of the wage-earners and of society in general. "Ever since I first turned my attention to questions of political economy,"—he confessed in 1821—"I have been of opinion, that such an application of machinery to any branch of production, as should have the effect of saving labour, was a general good, accompanied only with that portion of inconvenience which in most cases attends the removal of capital and labour from one employment to another."¹

Thus in 1815, in the "Essay," Ricardo had pointed out that the certain tendency of a low money price of corn "for a long time to ameliorate the condition of the labouring classes . . . would be nearly the same as the effects of improved machinery, which it is now no longer questioned, has a decided tendency to raise the real wages of labour."² In the first and second editions of the "Principles," this view seems to have been taken more or less for granted, the only reference to machinery being an incidental allusion: "Thus then is the public benefited by machinery: these mute agents are always the produce of much less labour than that which they displace, even when they are of the same money value."³

Twelve months later, when McCulloch, in a paper on "Taxation and the Corn Laws" in the *Edinburgh Review* (January, 1820) declared: "The fixed capital invested in a machine must always displace a considerably greater quantity of circulating capital,—for otherwise there could be no motive to its erection; and hence its first effect is to sink rather than to increase the rate of wages"—Ricardo promptly demurred: "The employment of machinery I think never diminishes the demand for labour—it is never a cause of a fall in the price of labour, but the effect of its rise. If one man erected a steam engine because it was just cheaper to employ the engine than human labour, and if this were followed by a fall in the price of labour, it would be no

¹ *Principles* (1821), pp. 466-7.

² *Essay*, p. 40.

³ *Principles* (1819), p. 39.

other man's interest to prefer also the use of the machine."¹

But at some time in between 1819 and 1821 Ricardo's views upon this subject underwent what he himself termed "a considerable change." The third edition of the "Principles" appeared in 1821 with a new chapter 'on the subject of Machinery, and on the effects of its improvement on the interests of the different classes of the State.' Ricardo gives no other explanation of the origin of the change than "further reflection," and the only clue is that afforded by the citation in the chapter of a paragraph from Barton's tract "On the Condition of the Labouring Classes of Society," with commendatory expressions: "Mr. Barton, in the above publication, has, I think, taken a correct view of some of the effects of an increasing amount of fixed capital on the conditions of the labouring classes. His Essay contains much valuable information."²

Ricardo's contention is, in brief, that when "improved machinery is *suddenly* discovered, and extensively used"—capital will be diverted from existing employment, instead of being saved and accumulated as happens when "discoveries are gradual." In the case of such diversion there may result "a diminution of gross produce; and whenever that is the case, it will be injurious to the labouring class, as some of their number will be thrown out of employment, and population will become redundant, compared with the funds which are to employ it."³

Immediately upon its appearance, Ricardo caused a copy of the new edition of the "Principles" to be sent to McCulloch. Nothing more than bare intimation of a radical change in view preceded actual transmission of the printed chapter, and the effect upon McCulloch, who in an article in the *Edinburgh Review* (March, 1821) on the "Effects of Machinery and Accumulation"—had just declared: "no improvement of machinery can possibly diminish the demand for labour, or reduce the rate of wages," was dismay

¹ Letters of Ricardo to McCulloch, p. 57.

² Principles (1821), p. 480 n.

³ Ibid., pp. 472, 478.

and indignation.¹ In forwarding the volume Ricardo invited criticism and the warmth of the reply suggests how deeply the soul of the Scotch economist was harrowed at the fancied apostasy; "it will arm those who have contended that Political Economy is a fabric without a foundation, with any additional arguments in favor of that opinion" . . . "little did I expect after reading your triumphant answer to the arguments of Mr. Malthus that you were so soon to shake hands with him, and to give up all."²

Ricardo's response was characteristically modest but firm, and the vindication which accompanied it helpfully supplements the formal exposition of his changed thought.³ The issue having been clearly defined, further discussion was by tacit consent omitted. But Ricardo lost no legitimate opportunity to reassert his opinion,⁴ and McCulloch's attitude had in 1825 so far changed that he could speak of the "Case supposed by Mr. Ricardo, with respect to Machinery" as "possible, but exceedingly unlikely ever to occur."⁵

Ricardo's "*Principles of Political Economy and Taxation*" was published in the spring of 1817. We have seen that the treatment of value therein contained was designed less as an independent exposition than as a warrant for the proposition that higher wages do not necessarily mean higher prices. But, just as in the case of Malthus's first statement of "the principle of population," it was less the

¹ Letters of Ricardo to McCulloch, p. 103.

² Ibid., pp. 105-106.

³ Ibid., p. 105.

⁴ On June 25, 1821—a week after he had written to McCulloch as above—Ricardo presided over a meeting of the recently organized Political Economy Club, and proposed the following query for discussion: "Whether Machinery has a tendency to diminish the demand for labour?" At the two succeeding meetings (December 3, 1821, and January 14, 1822), the discussion was postponed in consequence of Ricardo's absence from London. On February 4, 1822, the topic was considered; "but I could hardly satisfy myself of the general opinion"—Ricardo wrote to McCulloch a few days later. Further discussion was again postponed to a later meeting when Mill and Torrens might be present, but it was not then resumed.

⁵ *Principles of Political Economy* (1825), p. 165.

conclusion than the argument which was assailed. Ricardo found himself called upon not to establish any such novel proposition as that prices sometimes fell as wages rose, but more fundamentally to vindicate "embodied labour" as the soundest theoretical and the best practical measure of value.

This controversy appears to have begun with the appearance of McCulloch's highly laudatory notice of Ricardo's book in the *Edinburgh Review* for June, 1818. Six months earlier McCulloch, writing in the *Scotsman*, had defended certain of Ricardo's doctrines from a violent attack in the *British Review*.¹ But the ampler space of the quarterly first enabled him to present "an accurate exposition of the nature, as well of those general principles which Mr. Ricardo has been the first to ascertain, as of those which he has adopted from late writers, and combined with the others into one harmonious, consistent, and beautiful system."² Disproportionate in plan, marred by occasional inaccuracy and artificial simplicity, the review was nevertheless characterized by all of the intelligibleness and definiteness of McCulloch's expository writing. It is still to be read with profit by the troubled student of the Ricardian economics, while for the period in which and the circles for whom it was written it was nothing short of a boon. Even James Mill regarded it as "a masterly essay on the science, [and one that] will very much assist to disseminate correct views on a very intricate part of it."³

The theory of value and the use of "embodied labour" as its measure figured as the starting-point of McCulloch's exposition. Thereafter the propositions that the accumulation of capital and the payment of rent have no effect whatever in increasing the real price of commodities, and that a rise of wages is never followed by an increase of prices, were developed and stated with a precise absoluteness that could not fail to challenge rejoinder from those who were already on the verge of dissent.

¹ Letters of Ricardo to Malthus, pp. 145, 146.

² *Edinburgh Review*, June, 1818, p. 87.

³ Letters of Ricardo to McCulloch, p. 11.

The first serious protest came from Torrens, in his "Strictures on Mr. Ricardo's Doctrine respecting Exchangeable Value" in the *Edinburgh Magazine and Literary Miscellany* of October, 1818. Some time before, Ricardo and Torrens had had "a long conversation on this question, without convincing each other";¹ but the public criticism clarified the issue and compelled attention. Adam Smith had been careful, Torrens stated, to limit the principle that the quantity of labor measures value to the first and rude state of society; and Ricardo, in going further, had gone wrong. Ricardo admitted that the principle which he had asserted would not hold of capitals possessing unequal degrees of durability, but said they were exceptional cases. They were not the exceptional, but the common cases, replied Torrens, and therefore Ricardo's principles were entirely subverted by them. Even when the capitals possessed equal durability, the labor which they put in motion might be different and unequal; but competition would still bring the value of the products to the same point. Hence, although equal values no doubt emerged when equal capitals set equal quantities of labor in motion, there need be no necessary connection between the two circumstances, and the values might be equal in quite different cases also. It was not, therefore, the quantity of labor that determined exchangeable value; and Ricardo had mistaken "an accidental coincidence for a necessary connexion." The writer summed up: "Whenever capitals consist of different proportions of raw materials and wages, whenever the rate of wages happens to go higher in one business than in another, whenever capitals are of different degrees of durability, and whenever being of equal durability, the expenditure for wages is different, the value of the products will not be in proportion to the quantity of labour employed on them."²

McCulloch promptly supplemented his service as expositor by activity as champion. In the very next issue of the same magazine he undertook to explain that under the term

¹ Letters of Ricardo to McCulloch, p. 14.

² *Ibid.*, p. 16.

"labour" Ricardo included not only the labor employed on the capital after its accumulation, but the labour employed in actually accumulating capital, "the labour expended in forming the capital." In short, "What is capital but accumulated labour?"¹

But McCulloch's explanation was much too limited and unreal to be entirely acceptable to Ricardo. Moreover, Torrens's criticisms were supplemented by similar expressions from other quarters. As early as September, 1817, Malthus had given Ricardo's work a second careful perusal, and had found the measure of value—in Ricardo's phrase, one of "a very few important points on which we materially differ"—and had won from him the free admission that the proposed theory of value did not hold good in different countries when profits were different.² Similarly, some months later, the outcome of discussions between Lord King, Wishaw, and Malthus, was recorded by Ricardo as agreement that "the measure of value is not what I have represented it to be."³

It is likely that such criticisms strengthened the conviction, present to some extent from the first in Ricardo's mind, that the claim of "embodied labour" to serve as a measure of value must be relative rather than absolute excellence. The demands of his publisher for a second edition of the "*Principles of Political Economy and Taxation*" opportunely permitted some formal expression to this belief; and, when the book actually appeared early in 1819, the initial chapter 'on value' contained textual changes which, although not vital,⁴ may, in the light of what had gone before, be regarded as highly significant. The formal break marking the limit of the first statement of the theory of value had disappeared. The text of the chapter was

¹ Letters of Ricardo to McCulloch, p. 16; see also Letters of Ricardo to Trower, p. 66.

² Letters of Ricardo to Malthus, p. 139.

³ *Ibid.*, p. 148.

⁴ The edition "has nothing new in it, as I have not had the courage to recast it," wrote Ricardo to Say on January 11, 1820; see Letters of Ricardo to Malthus, p. 166.

divided into five sections with italicized summary headings, which, read in sequence, clearly suggest the passing of the prime purpose of the chapter from demonstration of the proposition that higher wages do not necessarily mean higher prices to a more accurately qualified statement of the practicability of "embodied labour" as a measure of value. Careful examination of the limited number of changes introduced in the text of the chapter itself confirms this impression, and reveals a visible effort to make the chapter turn thenceforth upon the measure of value rather than upon correlated dicta.¹ Whatever Ricardo's intention may have been, and whether in consequence of Torrens's criticisms or for other reasons, certainly, as far as formal expression is concerned, the second edition of the "Principles" showed an appreciable increase of reserve in the advocacy of "embodied labour" as a universal measure of value.

In the early spring of 1820 appeared Malthus's "Principles of Political Economy" with an entire section devoted to a vigorous and effective criticism of the adequacy 'of the labour which a commodity has cost, considered as a measure of exchangeable value.' Even more clearly than Torrens, Malthus emphasized the impracticability of the labour measure in the case of commodities produced by different proportions of fixed and circulating capital or by identical amounts of capital used for unequal periods of time. To these admitted exceptions to Ricardo's measure he added three new categories, arising respectively from (a) "the quantity of foreign commodities used in manufactures," (b) "the acknowledged effects of taxation," and (c) "the almost universal prevalence of rent in the actual state of all improved countries."² Malthus accordingly reached the

¹ Thus see the last paragraph of page 33 of the first edition, replaced by the last paragraph of page 31 of the second edition; the last paragraph of page 41 of the first edition, replaced by the last paragraph of page 39 of the second edition; and, most noteworthy, the three concluding paragraphs of pages 47-48 of the first edition, reduced by compression and omission to the less prominently placed paragraphs terminating section v. (pages 39-40 of the second edition).

² *Principles of Political Economy* (1820), p. 104.

definite conclusion that the quantity of labour which a commodity has cost in its production is neither a correct measure of relative value at the same time and at the same place nor a measure of real value in exchange in different countries and at different periods.¹

Had Malthus, like Torrens, stopped with negative criticisms, his position would have been secure. But the positive measure proposed by him in substitution—"a mean between corn and labour"—was as empirical as it was curious, and served merely to weaken his prime attack.

No less promptly than upon the occasion of Torrens's criticisms did McCulloch enter the lists in defence of Ricardo's doctrine against Malthus's attack, this time in the columns of the Scotsman. With the general tenor of the vindication Ricardo appears to have been content. "You have with your usual ability"—he wrote in acknowledgment—"met Mr. Malthus on what I consider his strongest ground," and then, in pleased acceptance of discipleship, "I assure you that I am highly gratified in having succeeded so well in my imperfect statements, as to engage you in their defence, for I should have no chance of procuring their admission into other people's minds, without your powerful assistance."²

But Ricardo was his own severest critic; and, however satisfactorily McCulloch's formalism might explain away the specific objections of commentators, it failed to restore tranquillity to the author's mind. The cases which had before been recognized as "exceptional" now began to take on co-ordinate importance; and, writing to McCulloch in May, 1820, Ricardo declared: "After the best consideration that I can give to the subject, I think that there are two causes which occasion variations in the relative value of commodities: 1st, the relative quantity of labour required to produce them; 2nd, the relative times that must elapse before the result of such labour can be brought to market. All the questions of fixed capital come under the

¹ Letters of Ricardo to McCulloch, p. 108.

² Ibid., p. 63.

second rule, which I will endeavour to explain if you should wish it."¹

This first explicit recognition of the co-ordinate influence of production-time in determining relative value—destined to remain thereafter an unsurmountable barrier in Ricardo's mind to the universal validity of the labour measure—made McCulloch fairly "tremble for the ark of his covenant," and we may well conceive the troubled inquiry which came from Edinburgh to London. Ricardo responded with a clear exposition of "the effects which the relative times before commodities can be brought to market have on their prices, or rather on their relative value."² The particular point at issue was the impracticability of Malthus's proposed measure of value rather than the entire accuracy of Ricardo's. Having expressed himself in no uncertain tone upon this matter, Ricardo added with characteristic frankness: "It must be confessed that this subject of value is encompassed with difficulties. I shall be very glad if you succeed in unravelling them, and establish for us a measure of value which shall not be liable to the objections which have been brought against all those hitherto proposed. I sometimes think that if I were to write the chapter on value again which is in my book, I should acknowledge that the relative value of commodities was regulated by two causes instead of by one, namely, by the relative quantity of labour necessary to produce the commodities in question, and by the rate of profit for the time that the capital remained dormant, and until the commodities were brought to market. Perhaps, I should find the difficulties nearly as great in this view of the subject as in that which I have adopted."³

It is likely that in the detailed "Notes on Malthus," written in the autumn of 1820, Ricardo fulfilled something of the intention herein expressed. But yielding to the counsel of McCulloch and Mill to avoid giving his treatise

¹ Letters of Ricardo to McCulloch, p. 65.

² *Ibid.*, p. 69.

³ *Ibid.*, pp. 71-72.

too controversial a character, this commentary was withheld from publication, and the missing manuscript still remains an important desideratum in the study of Ricardo's economic system.¹

By the end of 1820, however, Murray, the publisher, had again begun to clamor for a new edition of the "*Principles of Political Economy and Taxation*";² and Ricardo was enabled to realize in some degree his definitely conceived purpose. The urgency of the printer (the chapter 'on value' forming the first sheets), Ricardo's unwillingness to enlarge the book greatly or to increase its controversial elements,³ uncertainty as to the future of the "*Notes on Malthus*," and, most of all, the actual existence of a chapter 'on value,' resulted in "a few additions to the first chapter," designed "to explain more fully than in the last [edition] my opinion on the difficult subject of VALUE,"⁴ instead of the thoroughgoing-reconstruction which might have resulted "if I were to write the chapter on value again."⁵

But, withal, the chapter 'on value' in the "*Principles*" of 1821 is in content and tendency very different from that in the original edition of 1817 and a conspicuous though logical advance over that in the edition of 1819. Ricardo's purpose, first and foremost, was no longer to refute the proposition that higher wages were the cause of higher prices, but to show that embodied labor was the most practicable measure of value and that gold was its most serviceable standard expression. The "received doctrines" of Adam Smith and succeeding writers, that a rise in the price of labor would be followed by a rise in the price of all commodities, was disproved by inference rather than in detail; and the compatibility of higher wages and lower prices was relegated to incidental statement.⁶ On the other hand, the

¹ The Notes would have occupied about 150 printed pages, and would probably have appeared as an appendix to the third edition of the *Principles*; cf. *Letters of Ricardo to Trower*, p. 141.

² *Letters of Ricardo to McCulloch*, p. 87.

³ *Letters of Ricardo to Malthus*, p. 172.

⁴ Advertisement to the Third Edition of the *Principles*, ix.

⁵ *Letters of Ricardo to McCulloch*, p. 71.

⁶ *Principles* (1821), p. 45.

exceptions to the universal applicability of "embodied labour" as a measure of value were no longer glossed over as negligible, but described in sequence. Alterations in the rate of profits were recognized as co-ordinate in kind, though not in degree, with "embodied labour" as a determinant of value. Ricardo asserted with a new distinctness that "it would be wrong wholly to omit the consideration of the effect produced" thereby; and if, he added, "it would be equally incorrect to attach more importance to it,"¹ it was for the reason that "this cause of the variation of commodities is comparatively slight in its effects."² Thenceforth the prominence of "embodied labour" in Ricardo's treatment of value, to the relative neglect of other influences, was the result of deliberate convention rather than of culpable neglect.³

To both James Mill and McCulloch the modified views of Ricardo appear to have given concern. In the spring of 1821, hard upon the heels of the third edition of Ricardo's "Principles," appeared Mill's "Elements of Political Economy," designed, as Ricardo wrote to McCulloch, "to steer clear if possible of the difficult word value."⁴ But it was the difficulties of the concept rather than the concept itself which were avoided; for Mill restated the theory of a "labour embodied" measure with absolute, uncompromising rigidity. Beyond admitting that, "In estimating equal quantities of labour, an allowance would, of course, be included for different degrees of hardness and skill,"⁵ he recognized none of the exceptions to the measure which Ricardo described. Capital was merely "*hoarded* labour, that which has been the result of former labour, and either is applied in aid of the immediate labour, or is the subject-matter upon which it is bestowed."⁶ Three years later Mill took notice of the time element in value measurement, only to deny vigorously

¹ Principles (1821), p. 33.

² Ibid., p. 32.

³ Ibid., pp. 33-34.

Letters of Ricardo to McCulloch, p. 92.

Elements of Political Economy (1821), p. 72.

Ibid., p. 75.

its influence.¹ But in 1821 he could sum up decisively, "It thus appears, by the clearest evidence, that quantity of labour, in the last resort, determines the proportion in which commodities exchange for one another."²

Some intimation has already been given of McCulloch's anxiety.³ The discussion on value in Ricardo's "Notes on Malthus" appears to have caused further concern,⁴ and Ricardo himself sought by preparatory explanation to soften the blow which he knew would fall with the appearance of the third edition of the "Principles."⁵ But McCulloch, like Mill, was unyielding, and continued to maintain in his private classes and public lectures in Edinburgh a rigid labor measure.⁶ Early in 1822 he submitted his manuscript notes to Ricardo;⁷ and, if in the resultant criticism the issue was not emphasized, the difference was none the less clear and substantial.⁸

Parliamentary duties, corn-law agitation, fiscal discussions, and a continental tour absorbed Ricardo's time and attention during 1822. But early in 1823, probably in consequence of the discussion, in Parliament and out, of the effects of the Bank's resumption of specie payments upon general prices, the subject of value again became of high theoretical interest to the little coterie of economists of which Ricardo had become an important member. At a meeting of the Political Economy Club on February 3, 1823, with Torrens in the chair and with Malthus, Ricardo, Tooke, Mill, and Mushet among those present, a subject of discussion (proposed by Torrens) was, "What are the circumstances which determine the exchangeable value of commodi-

¹ Elements of Political Economy (2d edition, 1824), p. 95 et seq.

² Ibid. (1821), p. 74.

³ See p. 108 above.

⁴ Letters of Ricardo to McCulloch, p. 94.

⁵ Ibid., pp. 94-96.

⁶ Ibid., p. 118; cf. also McCulloch, Discourse on the Rise, Progress, Peculiar Objects, and Importance of Political Economy (1824), p. 66 et seq.

⁷ Letters of Ricardo to McCulloch, pp. 128, 132.

⁸ Ibid., pp. 131, 132.

ties?"¹ The minutes of the Club note significantly, "This last question was adjourned till the next meeting"—a procedure which suggests Maria Edgeworth's story of the gentleman who answered "when asked if he would be of the famous Political Economy Club, that he would, whenever he could find two members of it that agree in any one point."² Two months later, however, debate upon the same topic was resumed;³ and at a third meeting the related query, "Can there be an increase of Riches without an increase of Value?" was discussed.⁴

This theoretical debate was supplemented by the appearance early in 1823 of Blake's "Observations on the Expenditure of Government" and Malthus's "Measure of Value," and a little later by Western's motion in the House of Commons for the appointment of a committee to inquire into the effects of resumption. In each case the questions involved were, whether the alteration in prices was due to an appreciation of gold or to a depreciation of paper, and what standard measure afforded the best means of determining this fact.

Of the three circumstances, Malthus's tract came to Ricardo as the most direct challenge. Abandoning his earlier proposal of 1820 of a mean between corn and labor as a measure of value,⁵ and more dissatisfied than ever with Ricardo's proposed measure, Malthus announced his definite adherence to the "labour commanded" theory of Adam Smith. He asserted that relative value was measured by the amount of "accumulated and immediate labour ex-

¹ Minutes and Proceedings, 1821-82, vol. iv, p. 56. The discussion was originally fixed for the meeting held on December 2, 1822, and it was Torrens's comments thereon in *The Traveller* which evoked John Stuart Mill's earliest economic writing.

² *Life and Letters of Maria Edgeworth*, vol. ii, p. 408.

³ Minutes and Proceedings, 1821-82, vol. iv, p. 57. Sir Henry Parnell presided; and Tooke, Senior, Warburton, James Mill, Grote, Malthus, Ricardo, and J. S. Mill (as a visitor) were present.

⁴ Minutes and Proceedings, 1821-82, vol. iv, p. 59. McCulloch was present as a visitor. This was the last meeting held in Ricardo's lifetime; but the subject of value continued to engage the attention of the club for some time thereafter.

⁵ *Measure of Value*, p. 23, note.

pended on the commodity, together with the ordinary profits estimated upon such advances."¹ But this composite "must necessarily be the same as the quantity of labour which they will command;"² and, since the quantity of labor worked up in a commodity could not in many cases be practically ascertained, whereas the amount of labor which it would command was evident and palpable, the "commanded labour" theory was at once theoretically sound and practically serviceable.

The animated controversy which continued through the spring and summer of 1823 formed the final episode of Ricardo's scientific life. Long letters relating thereto passed between Ricardo and Malthus, and were summarized or actually transmitted with detailed commentaries to Trower and McCulloch. Mrs. Grote tells of dinners at "Threddle" where Mill, Ricardo, and McCulloch (then visiting London, and later Gatcomb Park) had interminable discussions upon the measure of value.³ Similarly, Ricardo wrote to Trower that Warburton and Torrens—to say nothing, doubtless, of Blake and Tooke and other members of the group—had "their particular view" as to a proper measure of value.⁴

In so far as this final contribution of Ricardo to the value controversy possessed any distinctive characteristic, it was the prominence accorded gold as a practical rather than "embodied labour" as an ideal measure of value. This was in part a reflex of contemporary Parliamentary debate, in part a reaction from McCulloch's insistence upon "the mathematical accuracy"⁵ of the labor measure. As against all of his adversaries, Ricardo continued to assert that an invariable measure of value was unobtainable, and that we can only make "the best choice amongst confessedly imperfect measures."⁶ To McCulloch and Mill he made further answer that a rigid labor measure accounted for

¹ Measure of Value, p. 14.

² Ibid., p. 16.

³ Bain, James Mill, p. 208.

⁴ Letters of Ricardo to Trower, p. 206.

⁵ Letters of Ricardo to McCulloch, p. 174.

⁶ Ibid., p. 177.

variations arising from more or less labor being required to produce commodities, but that it failed with respect to variations brought about by the use of varying proportions of labor and capital. "For these variations," he added, "there has never been, and I think never will be, any perfect measure of value."¹ To Malthus he similarly replied that, inasmuch as the great mass of commodities awaiting exchange were produced by the union of labor and capital for a certain length of time rather than by either labor or capital alone, a measure of value such as money, compounded of two elements, wages and profits, was more serviceable for practical purposes than a measure representing wages alone, such as "embodied labour," or profits alone, such as old oak-trees or a pipe of old wine.

It is idle to conjecture to what extent Ricardo, had his life been spared a few years longer, would have penetrated further into the value maze. He had come to a full sense of its intricacy, and had passed beyond the stage of disputation. Certainly, he would never have remained long quiescent in doctrinal agnosticism. All that we know of his intellectual tenacity and his logical method suggest that he would have forged steadily ahead, ultimately to attain, if not the central truth, at least a station far in advance of his disciples and his critics, and not far removed from that which his most sympathetic interpreters have been inclined to accord him.²

¹ Letters of Ricardo to McCulloch, p. 173.

² See in this connection Professor Marshall's remarkable note on "Ricardo's Theory of Value" in *Principles of Economics* (5th ed., 1907), pp. 813-821, to which the present writer, like so many other students of the Ricardian economics, is greatly indebted.

III

THE INFLUENCE

In describing the life and the work of David Ricardo as a political economist, the difficulties that present themselves are in the main those of interpretation and exposition. There is a definite and tangible subject-matter, sometimes elusive, often obscure, but yet capable of positive study, and repaying cautious and sympathetic effort with secure and instructive result.

When, however, we turn to the influence of Ricardo upon the progress of economic science, a very different problem presents itself. We have here to do with an indefinite and intangible *materiél*, not only intricate and complex in itself, but essentially subjective in decipherment. To trace the specific influence of an organically related element in the development of a science, and above all, of a social science, is too often a baffling inquiry. Organized knowledge as to men, their thoughts, their activities, not only affects, as it is affected by, the very elements studied; but it reveals, over and above this, the impress of environment, of association, of contact, and even of accidental circumstance.

This is the familiar problem of doctrinal history in the social sciences. But in the case of Ricardo the ordinary difficulties of intricate interrelation and puzzling valuation are aggravated by new, and happily for the historian of general economic thought, unusual elements. We have to do not merely with a conspicuous figure in a normal sequence, after the manner of much scientific progress in the nineteenth century, but with an abrupt and radical change, a veritable doctrinal cataclysm, of which the manifestation is obvious but the cause subtle.

Bitter as have been the controversies as to the nature and causes of Ricardo's influence upon economic science, there

is an impressive unanimity as to the reality of this influence. One body of opinion ascribes most of the form and much of the content of political economy in its present accepted phase to Ricardo. Another group insist with Jevons that this "able but wrong-headed man—shunted the car of Economic science on to a wrong line." A third point out that current enlightenment upon many important practical economic policies traces back to Ricardo's illuminating analyses, and a fourth rejoin that the great follies of economic radicalism which have embarrassed and delayed social progress in the last half century are Ricardian in derivation. All of these alike bear testimony to a fundamental impress and a far-reaching consequence.

At the outset I propose to consider the conditions—some personal, some objective—which made it possible for Ricardo to exercise so important and so enduring an influence upon economic thought. This will lead naturally to a review of the specific elements which make up that influence and perhaps, in conclusion, to some appraisal.

The conditions of English economic life in the closing years of the Napoleonic War were, as has been noted, of a kind to elicit a new economic theory. When Adam Smith, a half century before, projected and outlined "the inquiry into the nature and causes of the wealth of nations," his purpose was like that of every serious economic thinker of the hundred and fifty years preceding, to make clear in what manner the well-being of the nation might be enhanced. He was convinced that the general policy of industrial regulation, conceived though it had been with a view to benefiting the energy which it affected, not only failed to accomplish the end desired but embarrassed and checked productive enterprise. On the other hand, he appreciated the reactionary quality of French economic philosophy, and the extravagances of its practical formulae.

The "Wealth of Nations" was thus in direct succession to the long line of answers to the perennially recurring question "How can a country become rich and strong, and

the people in it comfortable and happy?" It was the question which North, Petty, Berkeley, Cantillon, Hume, Steuart—to single out only the more conspicuous names—propounded and attempted with varying success to answer. Even obscure pamphleteers of the eighteenth century reflected the same attitude. Thus the anonymous author of "Reflections on the Welfare and Prosperity of Great Britain in the Present Crisis"¹ declares "I must therefore desire the Reader to understand, Welfare and Prosperity, in the Vulgar, not in the Philosophical sense of the Words, to agree with me; that to be happy, is to be rich; that Wealth gives Lustre and Dignity; that Money, Commodities, Stock, &c., are Wealth; and consequently that I intend by the Welfare and Prosperity of the Nation, its Opulence, Power, and Pre-eminence. To support which Power, Opulence, &c., is the Object of my present Theme."

Far be it, to suggest any comparison in content between the works of these writers, partial and tract-like as they often were, with Adam Smith's great treatise. It is enough to contend that their purpose was, as that of Adam Smith, a reflex of national endeavor from the time of Oliver Cromwell: "How could England be made strong and her people prosperous!" The genius of Adam Smith showed itself in the wonderful acumen with which he discerned the advent of an industrial era, not necessarily the coming of 'the giant industry,' for he was philosopher not seer, but in his unerring recognition that labor, industry, intelligence, frugality, and not legislative policy and administrative interference were the avenues to national welfare.

We have seen how, in the notable years between the war with the American colonies and the final overthrow of Napoleon, a new and radically different problem became the concern of the serious observers of English economic conditions. It was no longer a question of how that nation could become rich. Machinery, motive power, the factory system, capitalistic organization, the growth of population, the

¹ London, 1756; p. 2.

amassing of huge industrial profits, the swelling volume of exported manufactures, the passing of England from a grain exporting to a food importing country—had all made unmistakably clear that the wealth of a country depended upon the quantity and the quality of its land, labor and capital, and that the greatest of these was labor. The theoretical principles underlying the productive process still awaited analysis and the normal development of economic science would have been in pursuit of this inquiry. But the productive mechanism itself was fairly well realized and before attention could be given to the more rarified speculation a new and compelling group of phenomena had diverted economic thought.

I refer of course to the prominence which, let us say, from 1797, the year of the Bank restriction, practical politics, philosophical speculation and economic judgment alike gave to the question, not any longer, how much wealth does the nation produce, or as very properly might have been asked, in what manner is that wealth produced; but, in quite a different spirit, what are the principles governing the partition of that wealth, or rather of its annual increment among economic classes! In a word, the problem of production though far from solved was for the time being eclipsed, and the problem of distribution loomed up in commanding importance.

In France, thanks to the social stratification of the ancient regime, this transition in economic interest had already been effected, and such attention as Adam Smith gave to the problem of economic distribution was undoubtedly due to physiocratic influence. But in England the seed fell on sterile ground. Not until parliament was called upon to determine whether legislative policy should be shaped, first, in the matter of the Bank, in the interest of debtor or of creditor; second, in the matter of corn laws, in the interest of agriculturalist, rather than of manufacturer; third, with respect to taxation and funding, in the interest of consumer instead of property owner—not until then was it

that the economic thinker, deriving his philosophical creed from the new utilitarianism felt impelled to inquire what will be the natural shares of these several classes, destined to be affected in one way or another by this contemplated legislation.

From 1800 on, the most acute economic thinkers began to turn from the, until then, definitive text of the "Wealth of Nations" and to press their inquiry along these lines left vague or fragmentary by Adam Smith. Long before the corn law issue of 1813-14 brought the debate to some culmination, Malthus, West, Torrens, and probably even Ricardo had undertaken to analyze the principles determining the relative shares of rent, profits, and wages. Such inquiries were not merely a philosopher's quest but a direct response to the inarticulate interest of the ordinary man of affairs. It was certain that sooner or later a clear and definite answer would be given to this interest and equally certain that if given in logical compact form it would win acceptance both from the economic fraternity and from the thinking public.

The time being ripe, the man was forthcoming. It is a commonplace to speak of Ricardo's business career as a clue to the quality and influence of his economic contributions. But such an objective explanation is uninforming. A truer and certainly a more illuminating interpretation is to say that those qualities of mind, in part a race heritage, in part a distinctively personal endowment, refined and intensified by education, apprenticeship, tutelage and experience—those very qualities which enabled Ricardo to outstrip so many of his competitors in the world of affairs inclined him to the interested pursuit of natural science and to brilliantly successful cultivation of economic analysis.

Of this equipment the most conspicuous fact was a remarkable degree of what might be described as mental disassociation. Ricardo was able to view—to the extent that no economist before or since has attained—a complex phenomenon, to single out therefrom one primary element, and

to trace its ultimate course free from the modifying or counteracting influence of opposed forces.¹ This habit of mind is, I think, the essential explanation of his brilliant achievements in the financial world. At a time when the money markets of Europe were in acute convulsion, and when political crisis, industrial revolution, agricultural disturbance had combined in one apparently inextricable conglomerate, it was that isolating power of Ricardo's mind, made effective by unerring logic and intellectual fortitude, which soon made him a conspicuous figure in the banking world. A man so constituted would naturally enough find recreation, if only as a sympathetic onlooker, in natural science. When Ricardo's mind centered upon economic analysis, attracted by the subject matter, challenged by the defects of the accepted exposition, and impelled by the press of contemporary issues, it was inevitable that his intellectual processes should be exactly of a kind with those that had signalized both his vocation and his avocation.

A French scholar in a recent critical study of Ricardo has dryly questioned whether obscurity of style ever injures one's fame, and that in the case of Ricardo as of Marx it has actually contributed thereto: "On n'aime guère, quand il s'agit d'un grand homme, à dire qu'il est inintelligible, soit par un sentiment de respect, soit peut-être de crainte de passer soi-même pour inintelligent et on s'efforce à chercher un sens profond aux passages les plus troublés."²

Ricardo's mode of expression, while devoid of literary skill either as to plan or style, had nevertheless a degree of effectiveness quite at variance with his own depreciative estimates. The pamphlets and the correspondence written under the stress of controversial warmth illustrate this very much better than the "Principles," which often discloses a benumbing consciousness of authorship. But even his

¹"Don't meddle with Ricardo," James Mill wrote to Francis Place. "It is not easy to find him in the wrong, I can assure you. I have often thought that I had found him in the wrong, but I have eventually come over to his opinion" (Add. MSS. Brit. Mus. 33, 152, f. 227).

²Gide et Rist, *Histoire des Doctrines Économiques depuis les Physiocrates jusqu'à nos Jours* (1909), p. 161.

doctrines, if demonstrated awkwardly were phrased compactly, often with a paradox-like snap. Such phrases as "the compatibility of a rise of wages, with a fall of prices," population "always increases or diminishes with the increase or diminution of capital," "the landlord is doubly benefited by difficulty of production"—once the principles underlying them were established—carried forward the propaganda with a momentum of their own.¹

But favorable as may have been the time, and peculiarly endowed the man and his manner, economic science would never have felt the Ricardian influence to the extent that it did but for the intellectual tenacity, the irrepressible enthusiasm and the propagandist activity of the group of friends, disciples and expositors—James Mill, McCulloch, Torrens, John Stuart Mill, Mrs. Marcet, De Quincy—who promptly espoused the new dispensation and gave it widespread currency. Adam Smith made political converts, Dugald Stewart aroused student enthusiasm, but Ricardo won aggressive disciples. Let us consider for a moment the relations of Ricardo and McCulloch.

First contact dated from June, 1816, in Ricardo's criticism of McCulloch's heterodox writings on the national debt. Regular correspondence followed McCulloch's unqualified acceptance of Ricardo's thought—indicated by laudatory notices of the "Principles of Political Economy and Taxation" and of the "Proposals for an Economical and Secure Currency" in the *Edinburgh Review*, in 1818. Actual intercourse occurred in the course of McCulloch's visit to

¹ The influence here was undoubtedly James Mill. The opening paragraph of "Commerce Defended" sets forth that: "Rousseau confessed to Mr. Hume, and Mr. Hume repeated the conversation to Mr. Burke, that the secret of which he availed himself in his writings to excite the attention of mankind, was the employment of paradoxes. When a proposition is so expressed as to bear the appearance of absurdity, but by certain reasonings and explanations is made to assume the semblance of truth, the inexperienced hearers are, in general, wonderfully delighted, give credit to the author for the highest ingenuity, and congratulate themselves on a surprising discovery. When these paradoxes are so contrived as to harmonize with any prevailing sentiment or passion of the times, their reception is so much the more eager and general."

London and to Gatcomb Park, in the spring of 1823. From the outset almost McCulloch became body and soul a Ricardian. "Mr. Ricardo has examined the fundamental principles on which the science of Political Economy rests"—he wrote in the *Edinburgh*¹—and "he has done more for its improvement than any other writer, with perhaps the single exception of Dr. Smith." And Ricardo himself avowed "My own doctrines appear doubly convincing as explained by your able pen, and . . . those who could not understand me, most clearly comprehended you."²

Thus imbued, McCulloch became a prolific and energetic expositor. From 1817 to 1827 he wrote the economic articles for the *Scotsman*, and for two years (1818–1820) he was editor of that journal. He became the principal economic reviewer of the *Edinburgh* in 1818 and continued so for twenty years. He contributed the important economic articles to the "Supplement of the *Encyclopedia Britannica*" in 1818–24, and to successive editions thereafter, and when Malthus filed a mild protest with the editor, Macvey Napier, at "the general adoption of the new theories of my excellent friend Mr. Ricardo into an *Encyclopedia*, while the question was yet *sub judice*"—McCulloch replied with some acerbity that the "Supplement" "was not intended merely to give a view of the science as it stood forty-five years ago, but to improve it, and to extend its boundaries."³ McCulloch conducted classes and gave lectures on the study of political economy in *Edinburgh* and *London* "to large audiences of Noblemen, Gentlemen, Merchants, and others."⁴ In 1824 he was the first Ricardo Memorial Lecturer, and in 1828 he was appointed to the chair of political economy, in *University College*. He wrote many books and pamphlets, compiled useful manuals and rendered important editorial services. For two generations, or cer-

¹ June, 1818, p. 60.

² Letters of Ricardo to McCulloch, p. 10.

³ *Ibid.*, pp. 147–148, note.

⁴ Notes of Mr. McCulloch's Lecture on the Wages of Labour and the Condition of the Working People (1825), p. 3.

tainly until John Stuart Mill's apogee, McCulloch was the veritable keeper of the economic conscience of England—and McCulloch's exposition was dogmatically, aggressively Ricardian.

Let us turn now from this brief survey of the causes of Ricardo's influence upon economic thought, to some estimate of the actual character of that influence. In the first place, there is a definite and tangible impress upon specific economic opinions. It is not too much to say that much of our present-day wisdom with respect to (a) currency, (b) taxation and (c) international trade is based upon Ricardo's analyses.

In the matter of currency, the development of monetary theory before Adam Smith, and more notably from Adam Smith to Ricardo, saw the appearance of many important principles. Ricardo's service was not merely to confirm and amplify such earlier doctrines, but to coordinate them with monetary practice to a degree that removed the questions involved from the arena of debate and established them as positive monetary canons. From the time of Gresham—or of Copernicus or Aristophanes—the impossibility of a concurrent circulation of standard and debased currency had been perceived; but Ricardo made clear that this principle operated only in face of aggregate redundancy, and thus laid the theoretical basis for the gold exchange currency of modern states. Hume and Harris—to say nothing of the economic liberals of the late seventeenth and early eighteenth centuries—had stated that money everywhere tends to a value level; but Ricardo established the territorial distribution of the precious metals as the theoretical basis of the international price level and the principles governing foreign exchange. Lord Liverpool had demonstrated the historic futility of the dual monetary standard in England, but Ricardo gave life and general application to this proposition and laid the ground work of modern monometallism. The necessity of restrictions upon issue functions other

than the presentation of discountable paper—the modern culmination of a half century struggle of currency versus banking schools—was set forth in “The High Price of Bullion” in 1810. The propriety of disassociating issue from discount functions—realized in the Bank Act of 1844—was proposed first in 1816 and urged anew in the “Plan for a National Bank” in 1823. The project of a “gold tipped currency” or a circulation made up of demand notes payable in specie upon legitimate occasion was advanced in the “Proposals for an Economical and Secure Currency” in 1816, was actually adopted in 1819, and has since become, in part the system, in part the endeavor of the most enlightened modern states.

In the matter of taxation, we owe to Ricardo acceptance of the principles, first that the social utility of any tax is determined not by its productivity but by its ultimate incidence; and second, that this “influence of taxation on different classes of the community” is traceable by scientific inquiry, being governed by the laws of economic distribution. These considerations have become the fundamental criteria of every modern testing of a tax proposal. Almost from the very beginning of economic writing fiscal pamphleteers and propagandists coupled with their advocacy of specific panaceas some reflections upon the social and economic effects of such measures, and these observations may perhaps be regarded as the beginnings of a theory of incidence. But it was Adam Smith who first, at least among English writers, after classifying the fiscal devices of the modern state, and commenting thereon with a remarkable combination of practical experience, literary equipment and hard-headed common-sense—sought to trace out the ultimate resting place and the wider consequence of every such measure. In taxation, as throughout, Adam Smith’s exposition was Ricardo’s starting point, and indeed as an apologetic paragraph in the ‘Preface’ to the “Principles” sets forth, it was only because of dissent from the theory of distribution implied in the “Wealth of Nations” that a

re-casting of the chapters on taxation became necessary. But it has been Ricardo rather than Adam Smith who has exerted the enduring influence in this direction. In Adam Smith's treatment of taxation, the variety of approach, the fullness of comment, the indistinctness of theory obscured and minimized the question of incidence. But in Ricardo's chapters there were simplicity, severity, coherence and compactness. Incidence—the effect of a tax upon economic classes—loomed forth in detached prominence as the occasion of inquiry, and the analysis itself proceeded with irresistible logic in the light of a clearly defined, easily grasped theory of distribution. That theory or the use made of it may or may not have been defective or partial; but the mode of procedure endured and has become the characteristic of modern fiscal discussion.

That the modern theory of international trade must be credited to Ricardo has been set forth in another connection. But more than this, the theory of international trade, "as it was left by Ricardo, and expounded, but not substantially altered, by Mill"¹ has furnished the scientific basis for the practical rule of free trade. This is alike the argument of advocates, and the verdict of historians of freedom of trade. Cairnes declared that "for those who accept the economic theory of international trade, no further proof of the essential soundness of this fundamental principle of commercial policy [free trade] is needed."² And with even greater definiteness, Professor Bastable has maintained,³ "The practical rule of "free-trade,"—that is, the removal of all artificial restrictions on, or encouragements to, any particular industry; the levying of duties for the purpose of obtaining revenue, and from no other motive; the levying of equivalent excise duties where customs duties are requisite; in short, the abandonment of the efforts, once universal, to divert industry into some channel into which the action of the normal economic forces would not have directed it,—is

¹ Cairnes, *Some Leading Principles of Political Economy*, p. 310.

² *Ibid.*, p. 375.

³ *Theory of International Trade* (1903), pp. 128-129.

a deduction from the theory of foreign trade" as expounded by Ricardo.

Before leaving the subject of Ricardo's influence upon economic policies, at least a word should be said of that commonplace tendency of modern social history to speak of the economic radicalism of the nineteenth century as an emanation of the Ricardian economics.¹ There is a certain superficial warrant for this. "Scientific" socialism, both in its earlier English phase and as developed by Rodbertus and Mark, rests upon the assumption that value is embodied labor, and the appropriation by the state, wholly or in part, of economic land rent—either as a social panacea as urged by Henry George or as a fiscal device as contemplated by recent tax reforms—is based upon the differential theory of rent.

But manifestly it is necessary here to distinguish between a doctrine and the misinterpretation or outright perversion of it. In a certain sense, every consequence that follows—however remotely or by reason of whatsoever new elements—the enunciation of a principle is to be considered in connection therewith. But in any estimation of influence, the tendency of the original message must be understood and the effect of the intervening forces appraised. To pursue any other course would be to hold religion responsible for the excesses of religious intolerance or to ascribe the waste and brutality of modern warfare to modern technical invention.

The place which Ricardo—in correction of the obvious gap in Adam Smith's exposition—accorded "embodied labor" was, as has been pointed out again and again, not as the cause but as the measure of value. Commodities possessing value are mensurable with respect to the several amounts of labor involved in their respective production, just as according to Adam Smith and Malthus, they might be compared with respect to the several amounts of labor which they would command or according to other theorists

¹ Thus as careful a scholar as Mr. Graham Wallas speaks of (*Life of Francis Place*, 1898, p. 267) "the 'surplus value' theory, that inevitable corollary of Ricardo's 'labour value'."

with respect to their exchange equivalents in gold, silver, wheat or what not. Not only did Ricardo regard embodied labor as merely one of a series of possible units of value measurement but he was very far from asserting its unique efficacy and indeed ultimately arrived at a state little short of doctrinal agnosticism. "To me it appears"—he wrote to McCulloch in the evening of his life—"that we have a choice only amongst imperfect measures, and that we cannot have a perfect one, for there is no such thing in nature."¹

So too in the matter of economic rent. With the progress of society, capital tended to increase, and in consequence of limitation upon the productive capacity of the soil, profits to fall and rents to rise. But these phenomena in themselves betokened no social injustice. They "ought never to be the subject of complaint, if they are the effect of the natural course of things" for "they are the most unequivocal proofs of wealth and prosperity."²

Sympathetic and warm-hearted in temperament, Ricardo was a firm believer in the possibility of economic betterment, particularly of the laboring classes. In the main this must take the form of self help in the direction of a higher standard of life: "The friends of humanity cannot but wish that in all countries the labouring classes should have a taste for comforts and enjoyments, and that they should be stimulated by all legal means in their exertions to procure them."³ There was ample opportunity for direct activity by "the friends of humanity"—such as Lancastrian education, savings banks and the early Owenism, with all of which movements Ricardo was actively identified. To such amelioration the state might very properly lend itself. Failing private agencies, Ricardo was one of the active supporters of Crespigny's unsuccessful motion in 1819 for a parliamentary inquiry into the reasonableness of Owen's scheme, and he was made a member of the Select Committee

¹ Letters of Ricardo to McCulloch, p. 176.

² Essay on the Influence of a Low Price of Corn, p. 20.

³ Principles (1819), p. 95.

of the House of Commons appointed in 1821 to consider the employment of the poor.

Yet withal Ricardo was an outright individualist, with profound respect for property rights and vested interests not as things desirable in themselves but as the essential bulwark of social stability. Thus he disavowed sympathy with McCulloch's proposal for the scaling down of interest upon the national debt and, free trader though he was, insisted upon the gradual rather than outright reduction of the corn duties. He admired Owen and respected Place, yet he subscribed heartily to the verdict of the committee of 1821 as to the Lanark scheme: "Certainly your committee feel every disposition high to estimate the effects of good education and early moral habits; but to conceive that any arrangement of circumstances can altogether divest a man of his passions and frailties as they comprehend principles in themselves undeniable, is a result which can never be anticipated."¹

By regarding economic distribution as the central point of the existing social order and the growth of economic rent as an incident of social progress, and by formulating compact dicta-like doctrines with respect to both, Ricardo perhaps stimulated mental inquiry as to the necessity of the prevailing system. In this sense—typified admirably by John Stuart Mill's later attitude—Ricardo may be conceived as an influence upon the genesis of social radicalism; but this is very different from the direct responsibility for Marxian socialism or Henry George land appropriation with which he has been charged, and constitutes a service rather than a reproach.²

There remains to be considered that which is after all the largest matter involved. What has been Ricardo's influence upon political economy in the narrower sense, that is conceived as a body of scientific doctrines!

¹ Cullen, *Adventures in Socialism* (1910), p. 166.

² The relation in detail of Ricardo's doctrines to economic radicalism is discussed with much acuteness by Professor Karl Diehl in his exhaustive *Sozialwissenschaftliche Erläuterungen zu David Ricardo's Grundgesetzen der Volkswirtschaft und Besteuerung* (1905).

I may dismiss with brief comment the extreme positions as to the futility or, even worse, the mischief of Ricardo's theoretical work taken by the historical school on the one hand and by the psychological group of economists on the other. In the first, there is such signal failure to consider Ricardo's doctrines in their development or context as to breed suspicion that the subject of examination has either been the bare detached text or perhaps even the modified paraphrase of later expositors. Certainly the mode of criticism signally exemplifies that very neglect of historical perspective arraigned therein as Ricardo's prime defect. As to the less definite but if anything more violent strictures of the "subjective" economists—time has held the bank. Thirty-one years have passed since Jevons in the Preface to the second edition of the "*Theory of Political Economy*," with the recurrent pessimism that characterizes all scientific progress, spoke of "a shattered science" and made both indictment and forecast. Yet Ricardo has remained the main stream, and Jevons and his successors have become minor tributaries. It may be that we are still discouragingly remote from that day "when at length a true system of Economics comes to be established" but surely there is some warrant for the hope that in preparation therefor we shall not have 'to pick up the fragments . . . and to start anew.'

Quite as unreal and insufficient is it to describe Ricardo's influence as a mere addition to or amendment of existing doctrine. In 1824 Malthus summarized the characteristics of "the new school of political economy" as set forth in its new principles of value, of demand and supply, and of profits.¹ But even Malthus, hostile dissenter as he was, was conscious of more fundamental differences, and the trend of subsequent opinion has been fully in accord.

As a matter of fact, the effective contribution of Ricardo to economic science was not content but method. It was he who, by example in the main, rather than by argument,

¹ *Quarterly Review*, January, 1824; cf. Bonar, *Malthus and his Work* (1885), pp. 275-281.

established the title of economic inquiry to the rank of positive science, capable of pursuit by the logical method of deduction. In so far as Adam Smith wrote a scientific treatise it was like the prose which Moliere's bourgeois spoke. Trained in classical philosophy, the academic successor of Carmichael and Hutcheson, the class-room expositor of "moral philosophy," it was inevitable that the "Wealth of Nations" both in lecture outline and in treatise form should bear the earmarks of a philosophy of the schools. And yet no student of method can speak of the "Wealth of Nations" as a scientific treatise. The excellence of the work, its wide-spread popularity and its practical influence grew out of a unique combination of useful information and common-sense argument, rather than logical plan or scientific method.

This appears, for example, at the very outset. After setting forth that the annual production of the nation is determined in large part by "the skill, dexterity, and judgment with which its labour is generally applied" Adam Smith omitted all analysis of these elements, and, declaring that "the greater part of the skill, dexterity, and judgment with which it [labour] is any where directed or applied, seem to have been the effects of the division of labour"—he devoted himself exclusively to the division of labor. His account of the working of this principle is a veritable economic classic. But when he passes from description and detail to philosophical induction there is an abrupt collapse. To ascribe this division of labor to "a certain propensity in human nature . . . to truck, barter and exchange one thing for another" and to regard this propensity as either "one of those original principles in human nature, of which no further account can be given" or as "the necessary consequence of the faculties of reason and speech"—is a logical lapse that has excited the astonishment of all subsequent commentators.¹

If we turn now to Ricardo, an impressive contrast pre-

¹ *Wealth of Nations*, Bk. I, chap. i, ii.

sents itself. Ricardo conceived his field of study with logical precision and he cultivated it with scientific spirit. The field so defined may have been an improper demarcation and the logical method employed by no means the best; but definition and method there were, and from Ricardo's time economic study has moved on, aspiring at least to be the analysis of a definite subject-matter by consciously logical method.

In part, this formalism as to scope and method came to Ricardo from without—probably from Dugald Stewart and Jeremy Bentham, through James Mill.¹ I can explain in no other manner the familiar use of such phrases as “the science of political economy,” “the laws of political economy”—to be found in Ricardo's pages in marked contrast with the entire absence of such terms in the “Wealth of Nations.” But to a greater degree it represents a native impulse, confirmed and heightened by Ricardo's sympathetic interest in natural science—chemistry and geology—and by his personal association with their devotees. To a mind as rigidly logical as his own it seemed an obvious truism that if political economy was to be studied at all it must concern itself, in the same sense as chemistry or geology were being pursued, with a definite subject-matter and employ as orderly a manner of reasoning.

What this subject-matter was, Ricardo set forth in a letter to Malthus of September 28, 1821—perhaps the only phrasing of it to be found in any of his writings: “the great enquiries on which to fix our attention are the rise or fall of corn, labour, and commodities, in real value, that is to say the increase or diminution of the quantity of labour necessary to raise corn and to manufacture commodities . . . mankind are only really interested in making labour productive, in the enjoyment of abundance, and in a good distribution of the produce obtained by capital and in-

¹Dr. Elie Halévy in his brilliant *La Formation du Radicalisme Philosophique* (1901) has urged with characteristic ability (vol. ii, pp. 214-246) that the primary source was J. B. Say and his French predecessors.

dustry.”¹ But the fruitful, in contrast with the possible, field of economic inquiry was very much narrower than this: “Political Economy you think”—he wrote in an often-quoted passage to Malthus—“is an enquiry into the nature and causes of wealth; I think it should rather be called an enquiry into the laws which determine the division of the produce of industry amongst the classes who concur in its formation. No law can be laid down respecting quantity, but a tolerably correct one can be laid down respecting proportions. Every day I am more satisfied that the former enquiry is vain and delusive, and the latter only the true object of our science.”²

Both of these sentences were written some years after the “Principles of Political Economy and Taxation” had made its first appearance, and like the declaration of the “Preface” to the treatise itself—“To determine the laws which regulate this distribution, is the principal problem in Political Economy”—might be regarded as belated justification rather than as preliminary design. It is very possible indeed that the formal phrasing was Mill’s influence; but the view point and the delimitation are essentially Ricardian.

It would be fantastic to seek for any formal exposition of method in Ricardo’s text. Yet from the very beginning of his activity as an economic writer, he avowed that logical procedure which he practised—assumption of definite forces and derivation of ultimate effects. Thus in the “Appendix” to the fourth edition of the “High Price of Bullion,” he declared: “It is self-interest which regulates all the speculations of trade; and, where that can be clearly and satisfactorily ascertained, we should not know where to stop if we admitted any other rule of action.”³ In more general form is the process of obtaining economic principles by deduction from primary elements involved in a letter to Malthus of October 22, 1811⁴—more than five years before

¹ Letters of Ricardo to Malthus, p. 198.

² Ibid., p. 175.

³ P. 70.

⁴ Letters of Ricardo to Malthus, p. 18.

the "Principles of Political Economy and Taxation" was written—the neglected significance of which may, perhaps, warrant citation in full¹: "I wish to prove that if nations truly understood their own interest they would never export money from one country to another but on account of comparative redundancy. I assume indeed that nations in their commercial transactions are so alive to their advantage and profit, particularly in the present improved state of the division of employments and abundance of capital, that in point of fact money never does move but when it is advantageous both to the country which sends and the country that receives that it should do so. The first point to be considered is, what is the interest of countries in the case supposed? The second what is their practice? Now it is obvious that I need not be greatly solicitous about this latter point; it is sufficient for my purpose if I can clearly demonstrate that the interest of the public is as I have stated it. It would be no answer to me to say that men were ignorant of the best and cheapest mode of conducting their business and paying their debts, because that is a question of fact not of science, and might be urged against almost every proposition in Political Economy. It rests with you therefore to prove that a case can exist where it may become the *interest* of a nation to pay a debt by the transmission of money rather than in any other mode, when money is not the cheapest exportable commodity,—when money (taking into account all expenses which may attend the exportation of different commodities as well as money) will not purchase more goods abroad than it will at home."

But although Ricardo regarded economic principles as uniformities based upon fundamental social impulses, he was far from neglecting actual conditions either in deriving and verifying his theories or in applying them in the form of positive legislation. Thus in the "Principles" in 1817, he undertook "to state his opinion" not only after "his best

¹ Professor Hector Denis has subjected this phase of the Ricardian economics to a most valuable and suggestive criticism in his *Histoire des Systèmes Économiques et Socialistes* (1907), vol. ii, p. 128 et seq.

consideration" together with the aid derived from preceding writers but "after the valuable experience which a few late years, abounding in facts, have yielded to the present generation." The pamphlets on currency and corn laws are direct analyses of contemporary conditions and in their controversial aspects abound with verifications and qualifications of general principles in the light of actual facts. Finally, in the application of general principles—be it the incidence of taxation, the influence of agricultural improvements, the desirability of compensatory corn laws, the minimum rate of wages—Ricardo was quick to recognize the modifications which general theory must undergo in application to actual affairs.

In short, Ricardo conceived a positive science of political economy constituted of the tendencies or laws prevailing with respect to a clearly defined group of phenomena. He derived a series of uniformities, first by deduction from fundamental principles of human conduct illustrated and tested by reference to past and present conditions. He assembled the principles thus obtained into a coherent whole, enunciated in unsystematic elliptical form, but characterized by all the essentials of a body of scientific doctrine. By this service he raised economic study to a new dignity, giving it consciousness and impetus. His data may have been inadequate, his method in part defective, and his conclusions sometimes misleading; but his inestimable service was in definitively converting economic speculation from detached inquiry or specific theorization to an organically related body of general principles. If the validity of certain of his doctrines has been questioned, if the universality of many of his conclusions has been denied,—such results reflect the incredible expansion of the subject matter of political economy which a century of industrial growth has brought forth. What Ricardo did remains the corner stone of economic science. But more than this, what he tried to do gave the momentum to scientific study of economic principles and has continued its chief inspiration.

INDEX

- Agriculture in England (1775-1825), 14-15; Ricardo's attitude upon, 60-63.
- Alison, Archibald, 20.
- Anderson, James, 20.
- Attwood, Thomas, 60.
- Bastable, Charles F., 90-91, 125.
- Bentham, Jeremy, 20, 43, 47, 52, 131.
- Berkeley, George, 117.
- Blake, William, 112, 113.
- Bonar, James, 12 (note), 48, 54.
- Bosanquet, Charles, 46.
- Broglie, Duc de, 52 (note).
- Brougham, Henry, 20, 54.
- "Bullion controversy," 45-46, 58-60.
- Cairnes, John E., 91, 125.
- Cannan, Edwin, 53, 57, 65, 73, 75, 97.
- Cantillon, Richard, 117.
- Chalmers, Thomas, 20, 42.
- Cobbett, William, 42.
- Cockburn, Henry, 19, 20.
- Corn law legislation, Ricardo's attitude upon, 60-63.
- Crespigny, Sir William de, 127.
- Cullen, Alexander, 128.
- Currency question, Ricardo's theory of, 58-60, 123-124.
- DaCosta, Isaac, 25 (and note), 31.
- Denis, Hector, 82, 133 (note).
- De Quincey, Thomas, 121.
- Destutt de Tracy, Comte, 52 (note).
- Diehl, Karl, 82, 128 (note).
- Dumont, P. E. L., 47, 52 (note).
- Dunbar, Charles F., 12 (note).
- Edgeworth, Maria, quoted, 30-31, 34, 48, 51, 52, 112.
- Edinburgh Review, The, 41, 44.
- Ely, Richard T., 57.
- "Embodied labour" as the measure of value, 67-71, 87-88, 89, 90, 103-114, 126-127.
- England, agriculture, industry, and finance in (1775-1825), 13-18.
- "Essay on the Funding System," 54.
- "Essay on the Low Price of Corn," 49, 65-66, 77-79, 100.
- Financial conditions in England (1775-1825), 16-18, 43.
- Fonteyraud, Alcide, 32, 35-36, 37 (note).
- Garnier, Germain, 35-36.
- Gatcomb Park, 50-51.
- Geological Society of London, 36 (and note), 47.
- George, Henry, 126.
- Gide and Rist, 120.
- Gonner, E. C. K., 82, 88 (note).
- Grain, import and export of, in England (1775-1825), 14-15.
- Grenfell, Pascoe, quoted, 39-40.
- Grote, George, 52, 67 (note), 112 (note).
- Grote, Mrs., 113.
- Haileybury College, 47.
- Halévy, Elie, 131 (note).
- Harris, Joseph, 123.
- "High Price of Bullion," 11, 12, 45, 58, 124, 132.
- Hobhouse, John Cam, Baron Broughton, 37, 47, 49.
- Holland, Lord, 47.
- Horner, Francis, 20-21, 41, 45-46, 72.
- Horner, Leonard, 47.
- Hume, David, 18, 47, 117, 123.
- Industrial revolution in England (1775-1825), 14-16.
- International exchange, Ricardo's theory of, 90-96, 125-126.
- Jeffrey, Francis, 20.
- Jevons, W. Stanley, 116, 129.

King, Lord, 105.
 "King of Clubs," 49 (and note).

Lauderdale, Earl of, 20.
 Liverpool, Lord, 123.
 "Loan contractors," 38-39.
 Lobatto, Rehuel, 25 (and note).

McCulloch, John R., 12, 34, 52, 53, 72, 76 (note), 82, 83, 84, 85, 86, 87, 91, 96, 97-98, 99, 100, 101-103, 104-105, 107-108, 110, 111, 112 (note), 113, 121-123, 128.

Machinery, Ricardo's view of the influence of, 99-102.

Mackintosh, Sir James, 47.

Malthus, Thomas R., 20, 22, 34 (note), 47-49, 52, 58, 67 (note), 69 (note), 72, 75-77, 78, 81, 82, 84, 85-86, 98, 99, 105, 106-107, 111, 112-113, 119, 126, 129.

Marcet, Mrs., 121.

Marshall, Alfred, 114 (note).

Marx, Karl, 126.

Mill, James, 20, 22, 34 (note), 41-44, 49, 52, 54, 58, 67 (note), 72, 75, 78, 81, 99, 108, 110-111, 112 (notes), 113, 121 (and note), 131, 132.

Mill, John Stuart, 92, 96 (and note), 112 (note), 121.

Morning Chronicle, The, 44, 45.

Mushet, Robert, 67 (note), 111.

Napier, Macvey, 20, 54, 122.

National debt, Ricardo's attitude toward, 61, 62-63.

North, Sir Dudley, 117.

"Notes on Malthus," 55, 108-109.

Parnell, Sir Henry, 112 (note).

Patten, Simon N., 69 (note), 81 (and note), 82, 88 (note).

Petty, Sir William, 117.

Pitt, William, 16-17, 18-19, 38.

Place, Francis, 47.

"Plan for the Establishment of a National Bank," 54-55, 59, 124.

Political Economy Club, 52, 67 (note), 102 (note), 111-112.

"The Price of Gold," 44.

"Principles of Political Economy and Taxation," 49-50, 55, 59, 79-99, 101.

Profits, rate of, Ricardo's theory of, 74-78.

"Proposals for an Economical and Secure Currency," 49, 59, 79, 124.

"Protection of Agriculture," 54.

Pryme, George, 20 (note).

Pulteney, 19.

Rent, Ricardo's theory of, 77-78.

"Reply to Bosanquet," 46, 59.

Ricardo, Abraham, 26-29, 32, 33, 34-35.

Ricardo, David, influence of conditions in England upon, 13-21; ancestry and early life, 21-38; prominence in financial life and economic education (1799-1809), 38-44; period of productivity as critic and author (1810-1819), 44-52; career in Parliament (1819-1823), 52-55; death, 55-56; his attitude toward currency question, 57-60; toward corn laws and agricultural distress, 60-63; toward taxation and funding, 62-63; development of his economic system, 63-114; causes of his influence on economic thought, 116-123; character of his influence, 123-134.

Ricardo, Mrs. David, 33-34.

Ricardo, David Israel, 24-25, 29 (note).

Ricardo family, 23-26.

Rodbertus, Karl Johann, 126.

Rogers, J. D., 57.

Say, J. B., 42, 52 (and note), 73, 79, 86, 99, 131 (note).

Say, Louis, 52 (note).

Seligman, E. R. A., 77 (note), 92, 98.

Senior, William N., 67 (note), 112 (note).

Sharp, Richard, 47.

Sismondi, Jean Charles Leonard Simonde de, 50 (note), 52 (note).

- Smith, Adam, and the "Wealth of Nations," 11-12, 13, 18-19, 20-21, 37, 64-72, 74-77, 85, 86, 88, 90-91, 99-100, 104, 109, 116-117, 119, 121, 123, 124-125, 126, 130.
- Smith, Sydney, 20, 47, 49, 51, 52.
- Smith, Thomas, 49, 52.
- Spence, William, 42.
- Steuart, Sir James, 117.
- Stewart, Dugald, 18, 19-20, 97-98, 121, 131.
- Taxation, Ricardo's theory of, 62-63, 97-99, 124-125.
- Tennant, Smithson, 47.
- Thornton, Henry, 47.
- Tooke, Thomas, 47, 67 (note), 111, 112 (note), 113.
- Torrens, Robert, 42, 67 (note), 72, 78, 86, 92-96, 99, 104, 111, 112 (note), 113, 119, 121.
- Trower, Hutches, 22, 45, 47, 50, 52, 99.
- Turgot, Anne Robert Jacques, 19.
- Value, Ricardo's concept of, 65-71, 82-90, 103-114, 118-119.
- Vansittart, Nicholas, 46.
- Veitch, John, 19.
- Wallas, Graham, 126 (note).
- Warburton, Henry, 47, 67 (note), 112 (note), 113.
- "Wealth of Nations," *see* Smith, Adam.
- West, Sir Edward, 78, 81, 119.
- Whishaw, John, 47, 51 (note), 52, 53 (note), 80 (note), 105.
- Wieser, Friedrich, 68.
- Wolf, Lucien, 27 (note).
- Young, Arthur, quoted, 20.

INDEX

- Abell, Judge Edmond, 73, 78, 80, 163, 164, 187.
- Actions, forms of, in suits against the State, 372-378.
- Actors' Union, 264.
- Acts of Reconstruction in La., (1866-1867), 180-192.
- Agreement in printing trades, 318-321.
- Agriculture in England (1775-1825), 466-467; Ricardo's attitude upon, 512-515.
- Alberts, B., 328.
- Allen, Gov. H. W., 65, 66 (note), 107, 111-112.
- Allen v. McCarthy, 326.
- Allied Printing Trades Council, 255, 256, 269, 304, 317-321.
- Amalgamated Wood Workers' General Council, 262, 267, 275, 290.
- American Federation of Labor, 255, 256, 264, 265, 300, 301, 314.
- "Appeal to the Trade and Labor Unions of the United States and Canada," 250.
- Aurora, Ill., Cigar Makers' Union of, 295.
- Baird, Gen. Absalom, 164, 165-169.
- Bakery and Confectionery Workers, 252, 258, 262, 267, 270.
- Banks, Gen. N. P., 32, 43, 45, 55-63, 64-65, 67-68, 83-85, 125, 131-132.
- Barbers' Union, 264, 267, 276, 288, 289.
- Beauregard, Major P. G. T., 24-25, 177, 185.
- Benjamin, Judah P., 23, 26, 27-28.
- Bentham, Jeremy, 472, 495, 499, 504, 583.
- Blend, Frederick, 248, 249.
- Bloete v. Simon, 325, 326.
- Boiler Makers and Iron Shipbuilders, 258.
- Bookbinders, International Brotherhood of, 317-321.
- Boot and Shoe Workers, 252, 261, 262, 268, 269, 281, 282, 286, 287, 298, 299, 302, 303, 306, 312.
- Bossier (La.) parish, riots in, 226-227.
- Boyce, Henry, 115, 116.
- Brewery Workers' Union, 267, 307, 321.
- Brooks, J. G., 253.
- Broom and Whisk Makers, 267, 293, 306.
- Brush Makers, 275, 296, 306.
- Buchanan, Gen. R. C., 201.
- Building Trades' Council, National, *see* National Building Trades' Council.
- "Bullion controversy," 497-498, 510-512.
- Butler, Col. A. J., 35, 119.
- Butler, Gen. B. F., 29, 33-44, 117-122.
- Buttons, trade-union, 257, 264, 277, 278.
- Can Makers' Mutual Protective Association, 252, 298.
- Carpenters' Eight Hour League of San Francisco, 244.
- Carriage and Wagon Workers' International Union, 261, 267, 275, 286.
- Carson v. Ury, 328, 329 (note).
- Chinese in cigar industry, 243-246, 297.
- Cigar Makers' Association of the Pacific Coast, 244-246, 323 (note).
- Cigar Makers' International Union of America, 248-251, 252, 253, 258, 259, 260, 262, 267-269, 271, 273, 275, 279-281, 283, 285, 289, 290 (and note), 291-295, 297, 299, 301, 302, 304, 307, 310, 311, 312, 323; anecdote concerning color of label, 250 (note).

- Cigar Makers' Protective Association v. Conhaim, 328 (and note).
- Cloth Hat and Cap Makers' Union, 267, 275, 276.
- Commissioner of Labor, report, 309, 312 (note), 331 (note).
- Compensation of slaveholders in La., 56, 60, 66, 70-71.
- Confederates in La. during reconstruction, 65-66, 89-90, 103-105, 107-108, 122-123, 186-192.
- Confiscation act in La. (1862), 36-40.
- Congressional reconstruction in La., 81-82, 149-155, 180-192.
- Constitution of the U. S., principles of, governing suits against States, 361-371.
- Constitutions of Louisiana (1852-1867), 45-46, 47, 48, 49, 67, 70-76, 79-81, 195-200.
- Consumers' League, 300, 301.
- "Contrabands," 117 (and note).
- Convention (La.) of 1864, 67-87; of 1866, 155-175; of 1867, 193-198.
- Conway, J. W., 202.
- Conway, Rev. T. W., 202, 207.
- Cooperationists in La., 17, 20 (note), 21-22.
- Coopers' International Union, 252, 262, 267, 286, 292, 293.
- Corn law legislation in England, Ricardo's attitude upon, 512-515.
- Cottman, Dr. Thomas, 41, 48, 50.
- Crescent, The (New Orleans), 23, 147, 149.
- Currency question, Ricardo's theory of, 510-512, 575-576.
- Cutler, R. King, 78, 90.
- Delta, The (New Orleans), 23, 35, 149.
- Democratic party in La. (1840-1868), 10-11, 13, 109-112, 159-161, 203-204, 209-215, 217.
- Denison, G. S., 36, 42 (note), 43 (notes), 69 (note), 129.
- Denver, Label League of, 300.
- Detroit, Cigar Makers' Union in, 249.
- Dostie, Dr. A. P., 29 (note), 41, 161-162, 168.
- Dunn, Oscar J., 202 (and note), 203.
- Durant, Thomas J., 46, 47, 83 (and note), 85-86, 189, 190.
- Durell, Judge E. H., 69, 73, 77, 157.
- Edgeworth, Maria, quoted, 482-483, 486, 500, 503, 504, 564.
- Elections in Louisiana (1861-1868), 16, 21-22, 41-42, 46-50, 51, 55-62, 65, 67-68, 88, 106-114, 147-148, 191, 193, 200-202, 209-215, 225, 230-231.
- Eleventh amendment and suits between States, 361-363.
- Emancipation proclamation in La., 46, 123-127.
- "Embodied labour" as the measure of value, Ricardo's theory of, 519-523, 539-540, 541, 542, 555-566, 578-579.
- England, agriculture, industry, and finance in (1775-1825), 465-470.
- Equitable relief in suits against the State, 414-423.
- "Essay on the Funding System" (Ricardo), 506.
- "Essay on the Low Price of Corn" (Ricardo), 501, 517-518, 529-531, 552.
- Executive reconstruction in La., 45-66, 99-145, 149-155, 175-179.
- Farragut, David G., 31.
- Federal courts, jurisdiction of, in suits between States, 363-369.
- Federation of Labor, American, *see* American Federation of Labor.
- Fehr, F. von der, 247 (and note).
- Fellows, J. Q. A., 49, 60.
- Fenner, C. F., 109, 116.
- Ficklen, John R., "History of Reconstruction in Louisiana (Through 1868)," 9-231.
- Field, A. P., 91.
- Financial conditions in England (1775-1825), 468-470, 495.
- Flanders, B. F., 41 (note), 42, 57, 190.

- "Forty acres and a mule," 102, 134.
 Fourteenth amendment in La., 154-155, 184, 204.
 Free State party in La., 45-47, 50-52, 55, 56-59.
 Freedmen's Bureau, 133-137.
 Fur Workers' Union, 261, 267.
 Garment Workers of America, United, *see* United Garment Workers of America.
 Gayarré, Charles, 11 (and note), 19, 27 (note), 116.
 Glass Bottle Blowers' Union, 258.
 Glove Workers' Union, 268, 274, 286, 296.
 Gompers, Samuel, 301.
 Granite Cutters and Stone Masons, 258.
 Grenfell, Pascoe, quoted, 491-492.
 Hahn, Michael, 42, 57-64, 90, 162, 168.
 Hancock, Gen. W. S., 191 (and note), 197-198, 200-201.
 Handlin, W. W., 72, 73 (and note).
 Hat Finishers' Association, joint label with the Hat Makers' Association, 251.
 Hat Makers' Association, *see* Hat Finishers' Association.
 Hatters of North America, United, *see* United Hatters of North America.
 Hatters' Union, 252, 261, 267, 273, 274, 275, 286, 290, 292, 293, 296, 299, 301, 303, 304, 311, 312.
 Hebert, Gov. P. O., 14-15.
 Hetterman v. Powers, 329 (note).
 "High Price of Bullion" (Ricardo), 463, 464, 497, 510, 576, 584.
 Hobhouse, John Cam, Baron Broughton, 489, 499, 501.
 Hollander, Jacob H., "David Ricardo," 463-586.
 Home colonies in La., 135-136.
 Horner, Francis, 472-473, 493, 497-498, 524.
 Horseshoers' Union, Journey-men, *see* Journeymen Horseshoers' Union.
 Hotel and Restaurant Employes' Union, 264, 267, 277, 296.
 Howell, Judge R. K., 41 (note), 73, 93, 96, 157-158, 173, 174.
 Hume, David, 470, 499, 569, 575.
 Hunt, Randall, 41 (note), 116 (and note).
 Industrial revolution in England (1775-1825), 466-468.
 Injunction against state officers, 381-387.
 Innocents, The, 214.
 International exchange, Ricardo's theory of, 542-548, 577-578.
 International Printing Pressmen and Assistants' Union, 318-321.
 International Stereotypers' and Electrotypers' Union, 318-321.
 International Typographical Union, 267, 269, 275, 276, 281, 282, 291, 299, 300, 317-321.
 International Union of Steam Engineers, 264, 322.
 Iron Molders' Union of North America, 258, 259, 260.
 Jacksonville, Ill., Cigar Makers' Union in, 249.
 Jewelry Workers' Union, 299, 311.
 Johnson, Andrew, reconstruction under, 99-145, 149-155, 175-179.
 Joint Conference Board in printing trades, 318, 319 (note).
 Jonas, B. F., 12 (note), 20 (note), 65 (note), 116.
 Journeymen Horseshoers' Union, 263, 264, 267, 275, 277.
 Journeymen Tailors' Union, 252, 261, 274, 313; agreement with Garment Workers, 313-314.
 Judiciary in Louisiana (1862-1865), 92-97.
 Kearney, Denis, 246.
 Kenner, Duncan F., 19, 65, 185.
 Knights of Labor, 243, 251, 252, 253, 267.

- Knights of the White Camelia, 205, 215-218, 223.
- Know-Nothing party in La., 11-12.
- Ku Klux Klan, 218-224.
- Label in American trade unions, origin of, 243; introduction into cigar industry, 243-250; term "union label," 245 (note); wide-spread use of, 253-256; of allied trades, 255; on product, 257-264; legend on, 258, 259; methods of attaching, 259-262; forms of, 262-264; universal design, 265; manufacturers' right to use of, 268-269; advertisement of, 279-283; infringement of, 283-284, 323-331; women and, 306; not a guarantee of quality, 310-311; extent of use of, 311-312; disputes over use of, 313-317; of federated unions, 317-321; counterfeiting of, 323, 325, 327-331; legality of, 324-331.
- Label custodian, 269, 271.
- Label holder, 267.
- Label secretary, 270.
- Ladies' Garment Workers' Union, 267, 301, 306, 314, 315; label secretary of, 271.
- Leather Workers on Horse Goods, 276.
- Legends on labels, 258.
- Legislature, Louisiana state (1864), 88-90; (1865), 115-117, 138-145; (1866), 146-149; (1867), 184; (1868), 203-204, 207.
- Lincoln, Abraham, attitude of Louisianians toward, 15; his views on slavery, 25-26, on Louisiana elections (1863-4), 48, 50-52, on reconstruction, 52-54, 82, 98-99, on negro suffrage, 63-64, on Louisiana constitution of 1864, 80 (note); his "Provisional Court," 93-96.
- Link, Bernard, 324.
- Link case, 324 (and note), 326.
- "Loan contractors," 490-491.
- Longstreet, Gen. James, 185-187.
- Louisiana, ante-bellum history in, 9-28; events of the war in, 28-32; Butler's administration in New Orleans, 33-44, 117-122; Banks's administration in New Orleans, 45-66; convention of 1864, 67-87; government during the war, 88-97; reconstruction under President Johnson, 98-145; riot of July 30, 1866, 146-179; reconstruction acts (1866-7), 180-192; restoration to the Union, 193-204; party organization, 205-224; massacre of 1868 and the presidential elections, 225-231.
- Lynch, James M., 300.
- McCulloch, John R., 464, 486, 504, 505, 524, 528 (note), 534, 535, 536, 537, 538, 539, 543, 548, 549-550, 551, 552, 553-555, 556-557, 559-560, 562, 563, 564 (note), 565, 573-575, 580.
- Machinery, Ricardo's view of the influence of, 551-554.
- Machinists' Union, 256.
- Malthus, Thomas, 472, 474, 486 (note), 499-501, 504, 510, 519 (note), 521 (note), 524, 527-529, 530, 533, 534, 536, 537-538, 550, 551, 557, 558-559, 563, 564-565, 571, 578, 581.
- Mandamus in equity, 401-414.
- Manufacturers' right to use of trade-union label, 268, 269.
- Martin, W. A., 329 (note).
- Massacre of 1868 in La., 225-230.
- May, Thomas P., 77-79, 84 (note).
- Meat Cutters and Butcher Workmen, 260, 264, 277, 299, 306.
- Merrick, Mrs. C. E., 29, 126.
- Metal Mechanics' Union, 256.
- Metal Polishers and Buffers, 254, 256.
- Metropolitan Police Bill (La.), 208-209.
- Mill, James, 472, 474, 486 (note), 493-496, 501, 504, 506, 510, 519 (note), 524, 527, 530, 533, 551, 560, 562-563, 564 (notes), 565, 573 (and note), 583, 584.

- Mill, John Stuart, 544, 548 (and note), 564 (note), 573.
 Mine Workers, United, *see* United Mine Workers.
 Molders and Stove Mounters, 252, 254, 308.
 Monroe, John T., 148, 187.
 Moonelis Case, *see* Strasser v. Moonelis.
 Moore, Gov. T. O., 15-16, 17, 24.
 Musicians' Union, 254, 264; uniforms proposed, 264.
 Muther, Frank, 244.
 National Building Trades' Council, 256.
 National Conservative Union party, 111, 137.
 National debt, Ricardo's attitude toward, 513, 514-515.
 National Print Cutters' Association of America, 262, 263, 283; "cutters," 262; "putters on," 263.
 Negro in relation to his master, 127-130.
 Negro labor in La. (1860-1865), 117-120, 130-143.
 Negro schools in La. (1864-1868), 74-75, 79, 199, 207-208.
 Negro soldiers, 120-123.
 Negro suffrage, 58-59, 62, 63-65, 67, 71-72, 79, 88-89, 108-111, 112-113, 143-145, 154-155, 159-179, 181-185, 187-189, 192, 193-196, 199-200.
 56 N. J. Eq. 649, 327.
 New Orleans, capture of, 30-31; Butler's administration in, 33-44, 117-122; riots in, 146-179, 229-230.
 Non-Suability of the State in the United States, Doctrine of (Singewald), 343-451.
 "Notes on Malthus" (Ricardo), 507, 560-561.
 Oath of allegiance, 38-39, 203-204.
 Officers of the State, suits against, 379-451.
 Omaha, Union Label and Home Industry League of, 302; Western Laborer of, 302.
 One-man shop, 294-296.
 Opelousas (La.), riot in, 227-228.
 Ordinance of secession of La., 18, 19-22.
 Painters, Decorators, and Paperhangers, 267, 269, 277.
 Paper Makers' Union, 259.
 Peabody, Judge Chas. A., 93-96.
 People v. Fisher, 327, 328.
 Photo Engravers' Union, 318-321.
 Piano and Organ Workers, 267, 291, 293.
 Picayune, The (New Orleans), 21, 23, 108, 206, 211.
 Pinchback, P. B. S., 195 (and note), 200, 208 (and note).
 Pitkin, J. R. G., 176 (note), 188.
 "Plan for the Establishment of a National Bank" (Ricardo), 506-507, 511, 576.
 Poles in hat industry, 251.
 Political Economy Club, 504, 519 (note), 554 (note), 563-564.
 Porter, Commander D. D., 32.
 "The Price of Gold" (Ricardo), 496.
 "Principles of Political Economy and Taxation" (Ricardo), 501-502, 507, 511, 531-551, 553.
 Print Cutters' Association of America, National, *see* National Print Cutters' Association of America.
 Printers' Union, 261.
 Printing Pressmen and Assistants' Union, International, *see* International Printing Pressmen and Assistants' Union.
 Profits, rate of, Ricardo's theory of, 526-530.
 Property, recovery of, in suits against the State, 388-400.
 "Proposals for an Economical and Secure Currency" (Ricardo), 501, 511, 531, 576.
 "Protection of Agriculture" (Ricardo), 306.
 "Provisional Court" of La., 93-96.

- "Radicals" in La., *see* Republican party.
- Reconstruction in Louisiana (Ficklen), *see* Louisiana, Congressional reconstruction, Executive reconstruction.
- Rent, Ricardo's theory of, 529-530.
- "Reply to Bosanquet" (Ricardo), 498, 511.
- Report on New Orleans Riots, 170-175.
- Republican party in La. (1865-1868), 112-115, 155-179, 203, 210, 212, 214-215.
- Republican, The (New Orleans), 194-195.
- Retail Clerks' International Protective Association, 254, 264, 267, 276, 296, 303.
- Ricardo, Abraham, 478-481, 484, 485, 486-487.
- Ricardo, David, influence of conditions in England upon, 465-473; ancestry and early life, 473-490; prominence in financial life and economic education (1799-1809), 490-496; period of productivity as critic and author (1810-1819), 496-504; career in Parliament (1819-1823), 504-507; death, 507-508; his attitude toward currency question, 509-512; toward corn laws and agricultural distress, 512-515; toward taxation and funding, 514-515; development of his economic system, 515-566; causes of his influence on economic thought, 568-575; character of his influence, 575-586.
- Riddell, J. L., 47-48.
- Riot of July 30, 1866, 146-179.
- Roselius, Christian, 18, 41 (note), 60, 69 (and note).
- Rozier, J. A., 17, 18, 41 (note), 68-69.
- Rubber Workers' Union, 255, 260.
- St. Bernard parish (La.), riot in, 228-229.
- St. Louis, Cigar Makers' Union of, 246-248, 323.
- San Francisco, Cigar Makers' Union in, 243, 297, 323; Laundry Workers in, 316; Carpenters' Eight Hour League of, 244.
- Say, J. B., 494, 504 (and note), 525, 531, 538, 551, 583 (note).
- Schmalz v. Wooley, 327.
- Schneider v. Williams, 327.
- Secession in Louisiana, 14-28.
- Sheet Metal Workers, 267, 272, 276, 283.
- Shepley, Gen. G. F., 33 (note), 41, 96.
- Sheridan, Gen. P. H., 164, 170, 187, 189, 190, 191.
- Shirt, Waist, and Laundry Workers, 263, 264, 267, 268, 273, 275, 276, 281, 282, 314-317, 321, 322.
- Shop card in American trade unions, 257, 264, 276, 288.
- Shop stewards, 272, 273.
- Simon, Martin, 325.
- Singewald, Karl, "The Doctrine of Non-Suability of the State in the United States," 343-451.
- Slavery, 12, 14, 25, 56-58, 60, 70, 72-74, 79.
- Slaves in hat industry, 251.
- Slidell, John, 10, 12 (and note), 26-27.
- Smith, Adam, and the "Wealth of Nations," 463-464, 465, 470-471, 472-473, 489, 516-524, 526-529, 537, 538, 540, 542-543, 551-552, 556, 561, 568-569, 571, 573, 575, 576-577, 578, 582.
- Social equality of white and negro races, question of, 64 (note), 129-130, 162, 178, 187-189, 207-208, 215.
- Southwood, Marion, 34, 39.
- Spedden, Ernest R., "The Trade Union Label," 243-331.
- "Squatter sovereignty," 12, 13.
- "Star" cars in New Orleans, 188.
- State courts, jurisdiction of, in suits between States, 369-370.
- States, suits against, 343-451.
- Stationary Engineers, 321.
- Stationary Firemen, 264, 321, 322.

- Steam Engineers, International Union of, *see* International Union of Steam Engineers.
 Steedman, Gen. J. B., 209, 213.
 Stereotypers' and Electrotypers' Union, International, *see* International Stereotypers' and Electrotypers' Union.
 Stevens, Thaddeus, 152-153, 154, 158 (and note), 180 (and note), 182 (note), 185 (note).
 Stewart, Dugald, 470, 471-472, 549-550, 573, 583.
 "Stickers" in American trade unions, 300, 305.
 Store card, 296.
 Strasser, Adolph, 249, 250, 295, 329.
 Strasser v. Moonelis, 326, 327.
 Suits against the State, 343-451; against public officers, 379-451. *See also* Table of Contents, 337, and Table of Cases, 339.
 Sumner, Charles, 91-92, 153, 154, 180-181.
 Tailors' Union. Journeymen, *see* Journeymen Tailors' Union.
 Taliaferro, J. G., 18, 22, 194, 230.
 Taxation, Ricardo's theory of, 514-515, 549-551, 576-577.
 Taylor, Gen. Richard, 31-32, 104 (note).
 Teamsters' Union, 264.
 Terre Haute, Cigar Makers' Union in, 249.
 Theatrical Stage Employes, 264.
 Thirteenth amendment in La., 90.
 Times, The (New Orleans), 49-50, 76, 77-79, 95, 115, 176-177, 185, 187, 192, 196.
 Tobacco Workers, 265 (note), 267.
 Tooke, Thomas, 499, 519 (note), 563, 564 (note), 565.
 Torrens, Robert, 494, 519 (note), 524, 530, 538, 544-548, 551, 556, 563, 564 (note), 565, 571, 573.
 Tort, principle of liability in, in suits against the State, 379-380; injunction against, 381-387.
 Trade Union Label, The (Spedden), 243-331.
 Travellers' Goods and Leather Novelty Workers, 267, 277, 292, 293.
 Tribune, The (New Orleans), 142-143, 144 (note), 188-189, 195, 196 (and note), 212-213.
 Tripartite Agreement in the printing trades, 318, 321.
 Trower, Hutches, 474, 497, 499, 502, 504, 551.
 Typographical Union, International, *see* International Typographical Union.
 Union, The (New Orleans), 58.
 Union Bar Label, 277.
 Union House Card, 277.
 Union Label and Home Industry League of Omaha, 302.
 Union party in La. (1862-1864), 40-42, 45-59.
 United Garment Workers of America, 261, 267, 269, 270, 272, 281, 291, 292, 297, 299, 313-317; agreement with Journeymen Tailors, 313, 314; label secretary of, 270, 271.
 United Hatters of North America, 251, 268.
 United Mine Workers, 258 (note).
 Upholsterers' International Union of North America, 254, 259, 262.
 Ury, Herman, 328, 329.
 Vagrant law of La. (1865), 140-142.
 Value, Ricardo's concept of, 517-523, 534-542, 555-566, 570-571.
 Voorhies, Albert, 164-166, 189-190, 202 (note), 203.
 Warburton, Henry, 499, 519 (note), 564 (note), 565.
 Warmoth, H. C., 113-115, 201, 203, 205-206, 230.
 Watch Case Engravers, 254, 255.
 "Wealth of Nations," *see* Smith, Adam.
 Wells, J. Madison, 57-58, 104-107, 109, 111, 112, 113, 116, 146-149, 159, 166-167, 173, 184, 185, 189, 190.

- Western Laborer of Omaha, 302.
Whigs in La. (1843-1850), 9-11.
Whishaw, John, 499, 503 (note), 504, 505 (note), 532 (note), 557.
White Camelia, *see* Knights of the White Camelia.
Wickliffe, R. C., 15, 109.
- Women's International Union Label League, 300.
Women's Label League, 300, 306.
Wood Workers' General Council, Amalgamated, *see* Amalgamated Wood Workers' General Council.
Young, Ex parte, 424-438.

F
375
F54

Ficklen, John Rose
History of reconstruction
in Louisiana

PLEASE DO NOT REMOVE
CARDS OR SLIPS FROM THIS POCKET

UNIVERSITY OF TORONTO LIBRARY

UTL AT DOWNSVIEW



D RANGE BAY SHLF POS ITEM C
39 12 24 01 11 015 7